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THE
Ontario Law Reports

CASES DETERMINED IN THE SUPREME COURT
OF ONTARIO (APPELLATE AND HIGH
COURT DIVISIONS).

1930-1931

REPORTED UNDER THE AUTHORITY OF THE
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JUDGES
OF THE
SUPREME COURT OF ONTARIO

DURING THE PERIOD OF THESE REPORTS.

APPELLATE DIVISION.

First Divisional Court.

THE RIGHT HON. SIR WILLIAM MULOCK, K.C.M.G., P.C., C.J.O.

THE HON. JAMES MAGEE, J.A.

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“ “ WILLIAM EDWARD MIDDLETON, J.A.

“ “ DAVID INGLIS GRANT, J.A.

Second Divisional Court.

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“ “ CORNELIUS ARTHUR MASTEN, J.A.

“ “ JOHN FOSBERY ORDE, J.A.

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HIGH COURT DIVISION.

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“ “ WILLIAM EDWARD RANEY, J.

“ “ NICOL JEFFREY, J.

“ “ CHARLES GARROW, J.

“ “ GEORGE HERBERT SEDGEWICK, J.*

* Appointed 19th December, 1930.

MEMORANDA.

JUDICIAL APPOINTMENT.

On the 19th December, 1930, George Herbert Sedgewick, Esquire, of Toronto, Province of Ontario, one of his Majesty's Counsel learned in the law, to be a Judge of the High Court Division of the Supreme Court of Ontario and *ex officio* a Judge of the Appellate Division of the said Supreme Court of Ontario.

CALLED TO THE BAR.

20th November, 1930.

Harold Duncan Van Horne, Edra Hles Sanders, Charles John Frederick Ross, Lily I. Sherizen, Nathan Aaron Taylor, Howard Wilfred Alles, Lawrence Smith Eckardt, Lorne Withrow Jordan, Morris Goodfellow, Gordon Richard Foster, Gordon Robert Brock, John Munroe Harris, Jacob Kaplan, Marian Sybil Bennett, Charles Holden Blair, Arthur Allison Wishart, James Bernard Garvin, Ronald Gilmour Everson, Stanley Cowan Mitchell, Herbert Ian Bradburn, Carl Keyfetz, Frank Elmer McMahon, Edward Russell Smith, Noel Beauchamp (Special—Quebec), Leon Lalande (Special—Quebec), James Cameron Hay, Maurice James Daly, Earle Thomas Bradfield, Edward Melville Smith Winder, Robert Stanley Johnston.

15th January, 1931.

Edwin Pearlman, Barney Cohn, David Ferguson Jackson, John Aubrey Marshall, Cyril Lancelot Calthrop Allinson (Special—New Brunswick), George Gillespie Dunlop (Special—Manitoba).

19th February, 1931.

Charles Joseph Kelz, Aurele Chartrand, Alexander Andrew McGillivray (Special—Alberta).

19th March, 1931.

John Kenneth Ross, Mortimer Moses Kasler, John Alden Aylen (Special—Quebec).

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REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT OF ONTARIO

(APPELLATE AND HIGH COURT DIVISIONS).

[APPELLATE DIVISION.]

RE PUBLIC SCHOOL BOARD OF SCHOOL SECTION 1 OF TOWNSHIP
OF NORTH YORK AND DUFF.

1930.

June 23.

*Schools—Expropriation of Land for School Site—Compensation to
Owner—Tribunal for Fixing—Official Arbitrator.*

Section 15 of the Municipal Arbitrations Act, R.S.O. 1927, ch. 242, applies to the Township of North York, which was incorporated in 1922 by 12 & 13 Geo. V. ch. 140; and, by sec. 20 of the School Sites Act, 1928, 18 Geo. V. ch. 54, the Official Arbitrator is the sole tribunal for fixing the price of school sites in a municipality for which an arbitrator has been appointed.

By the Interpretation Act, R.S.O. 1927, ch. 1, sec. 31, "Act" includes "enactment," and sec. 15 of the Municipal Arbitrations Act is a special enactment applying to the Township of North York.

Such an official arbitrator as the statute contemplates having been duly appointed, proceedings taken before a County Court Judge for fixing the price of a school site expropriated by the Corporation of the Township of North York were declared *coram non judice*, and his award was set aside on appeal.

AN appeal by H. C. Duff, a landowner, from an award made by LEE, Jun. Co.C.J., as arbitrator, of \$5,300 as compensation to the appellant for land expropriated by the School Board for a school site, the appellant objecting to the jurisdiction of the arbitrator.

May 14. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, JJ.A.

R. M. Willes Chitty, for the appellant. These proceedings should have been taken before the Official Arbitrator for the County of York, and not before a County Court Judge. By sec. 9 of the North York Township Incorporation Act, 1922, 12 & 13 Geo. V. ch. 140, it is enacted that "the provisions of all special Acts of this Legislature relating to the Township of York, in so far as they are applicable, shall apply and be in force in the Township of North York." By sec. 15 of the Municipal Arbitrations Act,

App. Div. R.S.O. 1927, ch. 242, it is enacted that "this Act shall extend to
 1930. and apply to the County of York and to the Township of York."
 RE PUBLIC A statute may be general in some respects and special in others:
 SCHOOL *Regina v. London County Council*, [1893] 2 Q.B. 454. For the
 BOARD OF difference between a special and general Act see *Lord Cromwell's*
 SCHOOL *Case* (1581), 4 Co. Rep. 12, particularly note D at p. 13a; *Hol-*
 SECTION 1 *lund's Case* (1597), 4 Co. Rep. 75a, at p. 76. The Municipal Ar-
 OF TOWN- bitrations Act is a general Act in some respects, as it applies to
 SHIP OF North York, but it is also special in some respects, for by sec. 15
 NORTH YORK (1) it specifically refers to the County of York and the Township of
 AND DUFF. York. By sec. 31 of the Interpretation Act, R.S.O. 1927, ch.
 1, "Act" includes "enactment;" and therefore sec. 15 of the Muni-
 cipal Arbitrations Act is clearly a special enactment applying to
 the Township of North York. An official arbitrator has been
 appointed for the Township of North York, and, by sec. 20 of the
 School Sites Act, R.S.O. 1927, ch. 54, the jurisdiction of the
 County Court Judge is ousted.

R. H. Sankey, for the Royal Trust Company, the first mort-
 gagee, stated that he wished to be protected as to costs if the
 award should not be upheld.

C. L. Fraser, for the School Board, respondent. The Muni-
 cipal Arbitrations Act is a general Act. In the index to R.S.O.
 1914 it is listed as a public Act, and so sec. 15 does not
 apply to the Township of North York. By virtue of sec. 31 of the
 Interpretation Act, "Act" includes "enactment," but "all special
 Acts" does not include "all special enactments." This would be
 giving these words an interpretation inconsistent with the con-
 text. Regard must be had to the whole of the section in deter-
 mining the sense of a particular word: *Craies on Statute Law*, 3rd
 ed., p. 86. Section 15 of the Municipal Arbitrations Act is not yet
 operative in the Township of North York, and an official arbitrator
 has not yet been appointed for that Township, consequently sec.
 20 of the School Sites Act does not operate to disturb the jurisdic-
 tion of the County Court Judge. Even if it is held that the
 Municipal Arbitrations Act applies to the Township of North
 York, it does not necessarily follow that all proceedings thus far
 are null and void, for, by sec. 10 of the Act, an action may be
 transferred to the Official Arbitrator at any stage, on such terms
 as to costs and otherwise as may be deemed proper.

June 23. The judgment of the Court was read by HODGINS,
 J.A.:—The sole objection made by the appellant is to the juris-
 diction of the learned arbitrator. Under sec. 20 of the School
 Sites Act, 1928, 18 Geo. V. ch. 54, proclaimed on the 14th May,
 1928, it appears that the Official Arbitrator is the sole tribunal for

fixing the price of school sites in a municipality for which an official arbitrator has been appointed.

There is no doubt of the fact that such an official arbitrator as the statute contemplates has been duly appointed under the Municipal Arbitrations Act, R.S.O. 1927, ch. 242, whose duty is to hold the arbitration to fix the price; and, if formal proof of the appointment is necessary, it should be allowed to be given by affidavit. I am not impressed by the argument addressed to us that sec. 15 of the Municipal Arbitrations Act does not apply to North York. By sec. 9 of the Act incorporating the Township of North York, 12 & 13 Geo. V. ch. 140 (1922), it is enacted that "the provisions of all special Acts of this Legislature relating to the Township of York, in so far as they are applicable, shall apply and be in force in the Township of North York." By sec. 15 of R.S.O. 1927, ch. 242, already mentioned, it is provided that "this Act shall extend to and apply to the County of York and to the Township of York." This is within the words above, as they are expressly made applicable to the Township of North York by sec. 15—for the Interpretation Act, R.S.O. 1927, ch. 1, sec. 31, makes "Act" include "enactment," and this is clearly a special enactment applying to the Township of York.

I think the whole proceedings herein before his Honour were *coram non judice*, and that the appeal should be allowed and the award set aside. No costs can be given, as no objection to the jurisdiction was made before the learned Judge, nor until after his award. The township corporation should, however, pay the costs of the Royal Trust Company.

I may add that the award recites that it is made pursuant to ch. 54 of the statutes of 1928 (already cited), and that the School Board in bringing the parties before the Judge overlooked sec. 20 of that Act.

Appeal allowed.

[APPELLATE DIVISION.]

MORTON V. NATIONAL TAXI LTD. AND TORONTO TRANSPORTATION
COMMISSION.

1930.

June 23.

Negligence—Street-railway—Injury to Passenger—Hidden Danger or Trap—Absence of Warning—Misleading Notice in Street-car—Application of Emergency Brake—Taxicab in Dangerous Position in Front of Street-car—Findings of Jury—Evidence—Joint Concurrent and Simultaneous Negligence.

The plaintiff, a passenger in a street-car operated by the defendant Commission, was injured by a fall from the car and sued the Commission and a taxicab company for damages for her injury, alleging

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RE PUBLIC
SCHOOL
BOARD OF
SCHOOL
SECTION 1
OF TOWN-
SHIP OF
NORTH YORK
AND DUFF.

Hodgins,
J.A.

1930.

MORTON
v.
NATIONAL
TAXI LTD.
AND
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TATION
COMMISS-
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negligence of both defendants. The street-car was what is called a "one-man" car, that is, there was no conductor, the fares being taken by the motorman, passengers entering by a door at the front and leaving by a door at the rear. In the car was a sign directing passengers to leave by the rear-exit, and another sign reading, "Do not stand on the treadle unless you wish to leave the car." The treadle is a step as wide as the door by which the passenger steps down to the street. Beneath the treadle is an electrical switch, and when a person stands on the treadle his weight causes an air-valve to open, and there is nothing then to prevent the opening of the exit-door at the treadle; and, if there is a sudden application of the emergency brake, causing a person standing on the treadle to be thrown against the exit-door, it opens. That was what happened to the plaintiff, and the reason for the application of the brake was that a taxicab of the defendant company, driven by its servant, had got into a dangerous position in crossing the tracks in front of the street-car. At the trial, the jury found that "the Commission was negligent in not warning passengers that there was danger in standing on the treadle in case the car had to make an emergency stop," and also "in having a sign up that would lead passengers to believe that they would be safe on the treadle while the car was in motion." The jury also found that the driver of the taxicab was guilty of negligence:—

Held, that the notice "Do not stand on the treadle unless you wish to leave the car" was an invitation to stand on it if one wished to leave the car, and implied that it was a proper and safe place to stand whilst the car was in motion.

The device which was set in operation by the plaintiff when standing upon the treadle was apparently unknown to her, and was to her a hidden danger, a trap, and she was entitled to be warned by the Commission of the danger.

Even if the driver of the taxicab by negligence caused the motorman to apply the emergency brake, that negligence did not excuse the Commission from the negligence found against it.

Held, also, that there was evidence to sustain the finding of the jury that the driver of the taxicab was negligent.

The injury to the plaintiff was caused by the co-operative effect of the negligence of each defendant.

Per HODGINS, J.A.:—It was a case of joint concurrent and simultaneous negligence.

APPEALS by both defendants from the judgment of RANEY, J., upon the findings of a jury, in favour of the plaintiff in an action for damages for injuries sustained by her by reason of the negligence of the defendants or one of them, as alleged.

The plaintiff was a passenger in a street-car of the defendant Commission, and whilst the car was in motion was standing on the treadle or exit-step preparatory to alighting, when the car stopped. By a sudden application of the emergency brake the exit-door was opened and the plaintiff was thrown from the car upon the street pavement, and so injured. The driver of a taxicab owned by the defendant company turned upon the track of the street-railway in front of the street-car, and that was the reason why the motorman of the street-car applied the emergency brake.

May 30. The appeals were heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

T. H. Lennox, K.C., and *A. H. Young*, for the appellant Commission. There is no evidence or finding of negligence on the part of the operator of the street-car, and by an order of the Railway Board the Commission is not liable in damages for an accident which results through the use of this type of street-car, called a "one-man car," unless it is operated in a negligent manner. The only duty which rested upon the motorman was to take all due precautions to avoid a collision with the taxicab: *Maloney v. Hamilton Street Railway Co.* (1929), 64 O.L.R. 444. This he did by applying the emergency brake. Although the jury has found that the motorman did not keep a proper lookout, the Court is not bound by this finding, as it was wholly unwarranted: *Elliott v. Toronto Transportation Commission* (1926), 59 O.L.R. 609. The plaintiff has not suffered a permanent injury according to the evidence of the medical experts, and therefore the amount awarded is excessive.

J. C. M. German, for the appellant company, argued that on the evidence at the trial the appellant company was entitled to succeed on its motion for a nonsuit. No evidence was submitted at the trial to prove that the driver of the taxicab was negligent. Liability only attaches to negligence which is either the sole effective cause of the injury complained of or is so connected with it as to be a cause materially contributing thereto. If the driver of the taxicab was negligent, such negligence did not bring about the injury as a direct and natural consequence. The mere fact that a careless act is in the same chain of events as an accident does not entail liability unless the act has in fact brought about the accident.

T. N. Phelan, K.C., and *H. J. Aikens*, for the plaintiff, respondent. The driver of the taxicab brought about a condition of danger. The negligence of each of the appellants is equally an effective cause of the injury, and without each one's negligence the accident would not have happened: *In re Polemis and Furness Withy & Co.*, [1921] 3 K.B. 560; *Carter v. Van Camp*, [1930] S.C.R. 156, at p. 167; *Gee v. Metropolitan Railway Co.* (1873), L.R. 8 Q.B. 161. There was no onus upon the respondent to submit any further evidence, after having proven that she was in the street-car and that she was thrown out of it without any negligence on her part. In such a case, the maxim *res ipsa loquitur* applies. There is a duty upon the Commission to take reasonable care to prevent injury to passengers from unusual dangers which are more or less hidden, of whose existence they are aware, or ought to be

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aware. The respondent was invited to stand upon the treadle, although it was known to the Commission that under certain conditions it was a place of danger. Under secs. 256 and 257 of the Railway Act, R.S.O. 1927, ch. 224, the Ontario Railway and Municipal Board merely approves of the construction and operation of "one-man" street-cars. When there is a statutory right to do a certain thing, that right does not allow you to do it in a negligent manner. It was not necessary for the motorman to apply the emergency brake in order to prevent the collision. The accident would not have occurred if the motorman had not applied the emergency brake, and so it was his negligence which caused the accident.

June 23. MULLOCK, C.J.O.:—These are appeals by the defendants from the judgment of Raney, J., after a trial with a jury.

The plaintiff was a passenger in a street-car of the Toronto Transportation Commission, and whilst the car was in motion she was standing on the treadle or exit-step preparatory to alighting, when the car stopped, and owing to a sudden application of the emergency brake she was thrown from the car upon the street and sustained injury, and this action is brought against the defendants for negligence in causing such injury.

On the findings of the jury, the learned trial Judge directed judgment to be entered against each defendant, and the appeals are from such judgment.

The street-car was what is known as a "one man" car, passengers entering by a door at the front, and leaving by a door at the rear-end. In the car was a sign directing passengers to leave by the rear-exit, and another sign saying: "Do not stand on the treadle unless you wish to leave the car." The treadle is a step as wide as the door by which the passenger steps down from the car to the street. Beneath the treadle is an electrical switch like a push-button for a bell, and when a person stands on the treadle his weight causes an air-valve to open, and there is nothing then to prevent the opening of the exit-door at the treadle, and, consequently, if in case of an emergency there is a sudden application of the emergency brake, if the person standing on the treadle is thrown against the exit-door, it opens.

The car in question was proceeding easterly on St. Clair-avenue and was approaching Yonge-street. The plaintiff, intending to leave it at the Yonge-street stop, stepped on the treadle at the rear-exit, and in a moment there was a sudden application by the motorman of the emergency brake, and the plaintiff was thrown

against the door and out of the car upon the pavement and sustained the injuries in question.

The jury found that "the Commission was negligent in not warning passengers that there was danger in standing on the treadle in case the car had to make an emergency stop," and also "in having a sign up that would lead passengers to believe that they would be safe on the treadle while the car was in motion."

The notice "Do not stand on the treadle unless you wish to leave the car" is an invitation to stand on it if one wishes to leave the car, and implies that it is a proper and safe place to stand whilst the car is in motion. It cannot have reference to stepping upon the treadle when the car is stationary, as it is necessary to step upon it in order to leave.

The device which was set in operation by the plaintiff when standing upon the treadle was, as far as appears, unknown to her and was to her a hidden danger, a trap, and she was entitled to warning of such danger by the Commission. Lawrence O'Keefe, the motorman on the occasion in question, swore that he put his emergency lever into "emergency," that is, to the extreme right, the effect of which on the door was that it was "balanced" so that any one could push it open.

Even if the taxicab-driver by negligence caused the motorman to apply the emergency brake, such negligence cannot excuse the Commission from the negligence found against it by the jury. O'Keefe, the motorman, swore that emergencies calling for application of the emergency brakes were of frequent occurrence. The Commission knew that if a person was standing on the treadle of a car whilst in motion, the effect of the application of the emergency brake was to "release" the door in front of the treadle, and it had reason to anticipate that in the operation of its cars in a populous community like Toronto, there would arise emergencies calling for their sudden stoppage by the application of emergency brakes, and that a more or less violent jerk would thereby be imparted to the car and to its passengers, and that any person standing on the treadle might be thrown against the released door and out upon the pavement.

Under these circumstances, it was the Commission's duty not to invite passengers to stand upon the treadle, but on the contrary to warn them against doing so. It was its duty to exercise all reasonable care in the carriage of the plaintiff in safety, and I am of opinion that it failed in its duty towards her, both in inducing her to stand upon the treadle and in not warning her against the danger, unknown to her, of her doing so, and there is ample evidence, in my opinion, to support the jury's finding of negligence

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App. Div. against the Commission, and its appeal should be dismissed with costs.

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Dealing now with the appeal of the National Taxi Limited: Mr. German raised three grounds of defence: (1) that at the close of the plaintiff's action there was no evidence of negligence in the operation of the taxicab, and that therefore his motion for a nonsuit should be granted; (2) that on the whole case there was no evidence of negligence in the operation of the taxicab; (3) that, even if the driver of the taxicab was guilty of negligence in endeavouring to cross the track in front of the street-car, nevertheless such negligence did not cause or contribute to the accident, but that it was caused wholly by the negligence of the Commission.

With reference to the first ground of defence, Harry Morton (no relation of the plaintiff) was the driver of the taxicab at the time of the accident, and was called as a witness for the plaintiff. His evidence was to the following effect: that he was going easterly along the south side of St. Clair-avenue, intending when near Yonge-street to make a left turn across the street-car tracks in order to proceed westerly along St. Clair-avenue; that he was going at the rate of 3 or 4 miles an hour, and in his mirror saw the approaching street-car about 170 yards west of him; that he held out his hand to shew his intention of making a left turn, and that as he made it he looked and saw the street-car 30 yards away, and that when his left front wheel got on the car-track he threw his car into reverse and backed about one foot but could not back any farther because of another car blocking his retreat, and that whilst he was in this position the street-car struck him. He swore that at the speed of 3 or 4 miles an hour, which was then his speed, if he saw danger he could stop his car in 6 inches. He knew the street-car was approaching and was near at hand, and almost at the moment of his turning on to the track he realised that he had put his car in a dangerous position. The evidence shews no reason for his not having apprehended such possible danger before incurring it, and the jury was entitled, if it saw fit, to find from Morton's evidence that he was negligent in entering upon the track in front of the street-car, and I therefore think the learned trial Judge rightly refused a nonsuit.

At the close of the plaintiff's case the Commission called the following witnesses as to the action of Morton, the driver of the taxicab, and, counsel for the National Taxi Ltd. cross-questioning them, the plaintiff became entitled to the benefit of their evidence as against the National Taxi:—

Walter G. Boscall swore that he was waiting at the south side of St. Clair-avenue for the approaching car and heard the gong

sounded and that the taxi driver turned deliberately in front of the street-car when the car was between 10 and 12 feet away, and that the taxi-driver gave no sign, by gong or otherwise, as to his intention to turn.

George Bryan swore that he was about 30 feet west of Yonge-street on St. Clair-avenue at the time of the accident; that the taxi-driver came westerly alongside of the street-car, the front of the taxicab being about 8 or 10 feet in front of the car, and that it suddenly swerved to the left, and when the wheel was on the track the street-car struck the taxicab. This witness swore that at a point 30 or 40 feet distant from the place where the accident happened he heard the ringing of the bell of the street-car.

Lawrence O'Keefe, the motorman of the car in question, swore that the taxicab cut in front of the car when only 8 feet in front of it, and that he applied his emergency brake to avoid hitting it; that the driver of the taxicab gave no warning or indication of any kind of his intention to turn in front of the car.

The jury, in finding the driver of the taxicab guilty of negligence, evidently accepted the evidence of these witnesses, and thus, even if the learned trial Judge erred in refusing a nonsuit, there was evidence of the driver's negligence on the whole case.

As to Mr. German's third ground of defence, I am unable to concur in his contention that, even if the taxi-company was guilty of negligence, yet, having regard to the construction and operation of the street-car, the accident was occasioned solely by the negligence of the Commission in inviting the plaintiff to stand upon the treadle, and in not warning her against doing so. Each defendant was guilty of negligence, and that of the taxi-company made operative that of the Commission, and set in motion a force which was the real and direct cause of the accident, and which it was impossible for the Commission to avert.

The injury to the plaintiff was caused by the co-operative effect of the negligence of each defendant, and I am of opinion that the appeals of the defendants should be dismissed with costs.

MAGEE, MIDDLETON, and GRANT, JJ.A., agreed with MULLOCK, C.J.O.

HODGINS, J.A.:—I think this is a case of joint concurrent and simultaneous negligence, as exemplified in *Judson v. Haines* (1918), 42 O.L.R. 629, and *Morris v. Hamilton Radial Electric Railway Co.* (1922), 52 O.L.R. 120, and would dismiss both appeals with costs.

Appeals dismissed.

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[APPELLATE DIVISION.]

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Contract—Insurance against Loss through Wrongful Conversion of Motor-vehicles—Actions upon Policies—Agreement of Credit Company to Furnish Reports—Breach—Claim by Insured against Credit Company—Damages—Subrogation—Interest—Pleading.

The defendant insurance company insured the plaintiff company against loss through wrongful conversion of certain motor-vehicles. The plaintiff company carried on a business of dealing in security instruments in respect of motor-vehicles. Part of its business was to finance dealers in motor-cars, and R., a dealer in motor-cars, was one of its customers. The plaintiff company, in order to be satisfied that the cars the purchase of which it was financing were actually in R.'s possession or control as security for the advances made, employed the defendant credit company to give necessary information as to the manner in which R. was dealing with the cars. To the credit company's agent in the locality where R. carried on business was entrusted the duty, pursuant to the agreement between the plaintiff company and the credit company, of personally examining each motor-vehicle on a list furnished by the plaintiff company, on forms supplied by the latter, checking the serial number by personal examination, reading the speedometer, and certifying to the credit company that he had done these things himself and that the cars were on hand. The local agent failed to carry out his instructions. He made a few perfunctory examinations; in the great majority of cases he made no inspection, but accepted the word of R.'s manager that the cars upon the list were in fact in R.'s garage, when in truth they were not. R. became involved in financial difficulties, and it was found that of about 70 cars financed by the plaintiff company and which should have been in R.'s garage, not one remained—all the security to which the plaintiff company was entitled had disappeared. In these actions the plaintiff company sought to recover from the defendant insurance companies the amount of its loss and from the credit company damages for breach of its agreement to furnish accurate reports as to the whereabouts and condition of the cars. The insurance companies, by third party proceedings, claimed over against the credit company indemnity and relief in respect of any liability that might be found against them, upon the ground that the credit company had contracted not only with the plaintiff company but also with the insurance companies to check over, etc., that it had failed to do so, and the loss followed as a result. The defence of the credit company was that, by reason of an agreement signed by the manager of the plaintiff company, the credit company was absolved from responsibility for any loss that might occur through the use of the information furnished:—

Held, that the agreement was a special one dealing wholly with a possible use which might be made of the information, so far as outsiders were concerned, and had no reference to the use by the plaintiff company of the information contained in the reports for the purposes of the business out of which originated the contract with the credit company; and that the plaintiff company was entitled to recover against the credit company.

The plaintiff company was entitled also to recover against the insurance companies upon the ground that there was wrongful conversion or other wrongful appropriation, or fraud or dishonesty of R., in contravention of the terms of the security instrument, including the disappearance of the motor-vehicles either permanently or temporarily.

The cause of action upon which the plaintiff company recovered against the insurance companies was different from that upon which it recovered against the credit company, but that difference did not defeat the claim of the insurance companies to be subrogated to the rights of the credit company.

By reason of the breach of contract or the fraud of the agent of the credit company, an amount was recovered which recouped the plaintiff company in part for its loss; and, when it sought to recover the amount of the loss from the insurance companies, it was bound to credit upon its claim what it had so received.

The test is, "Can the right to be insisted on be deemed to be one the enforcement of which will diminish the loss?"

Review of the authorities. *Castellain v. Preston* (1883), 11 Q.B.D. 380, specially referred to.

Held, also, that the plaintiff company was entitled as against the insurance companies to recover interest at the legal rate upon the amounts for which they recovered judgments, the interest to be computed from the expiration of 60 days from the delivery to the insurance companies of the respective proofs of loss, notwithstanding that no claim for interest was made in the pleadings.

Toronto Railway Co. v. City of Toronto, [1906] A.C. 117, followed.

IN each of these actions the plaintiff company sought to recover from the defendant insurance company the amount of its loss as claimed, pursuant to a policy of insurance issued by the defendant company in favour of the plaintiff company by which the insurance company insured the plaintiff company against loss through wrongful conversion of certain motor-vehicles, using the term "conversion" in the broad sense employed by the policies themselves.

In each action also the plaintiff company joined as a defendant the Retail Credit Company Inc. and claimed against it damages to the extent of its loss for alleged breach by the Retail Credit Company of its agreement with the plaintiff company to furnish the plaintiff with accurate reports in regard to the whereabouts and condition of the cars in question.

In each action also the defendant insurance company, as well as resisting the claim of the plaintiff company on certain grounds, also claimed over by way of third party procedure against the Retail Credit Company Inc. for indemnity and relief in respect of any liability that might be found against the insurance companies, upon the ground that the Retail Credit Company had contracted not only with the plaintiff company but also with the defendant insurance company to check over and verify the number and condition of motor-vehicles in the possession of the dealer, that it had failed to do so, and the loss followed as a result.

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The actions and third party issues were tried together by GARROW, J., without a jury, at a Toronto sittings.

Gideon Grant, K.C., and *H. R. Frost*, K.C., for the plaintiff company.

Gordon Shaver, K.C., for the defendant the Merchants Casualty Insurance Company.

D. L. McCarthy, K.C., and *F. J. Hughes*, K.C., for the defendant the Western Assurance Company.

I. F. Hellmuth, K.C., *R. H. Greer*, K.C., and *J. R. Cartwright*, for the defendant and third party the Retail Credit Company Inc.

December 9, 1929. GARROW, J.:—The liability of the Merchants Casualty Company, if any, extended down to and included the 31st March, 1927, and that of the Western Assurance Company commenced on the 1st April, the first named company having gone off the risk and the second coming on it at this date.

The plaintiff company carried on a business of dealing in lien-notes, agreements, and security instruments in respect of motor-vehicles. Part of its business was to finance those who deal either in a wholesale or retail way in motor-cars, and one of its important customers was one R. H. Raynor, who carried on business in a large way at Belleville and at Picton. In order to finance his purchases of cars from the manufacturer, the arrangement made between the plaintiff company and Raynor was somewhat as follows. A shipment of motor-vehicles, for the most part Chrysler cars, would be made to Belleville or Picton, consigned to the order of the manufacturer. Upon being notified of the shipment, Raynor, under the arrangement with the plaintiff, would go to the bank of the plaintiff at Belleville, execute a promissory note, usually at 3 months, for the amount of the purchase less 10 per cent., which he paid himself, execute also a bill of sale of the car or cars in question to the plaintiff company and complete at the same time a conditional sale agreement by which the plaintiff company agreed to re-sell to him the vehicles covered by the shipment, the title to the cars remaining in the plaintiff company until payment. With these completed documents he was then in a position to draw upon the plaintiff company for the amount of the balance of the purchase-price, attaching these documents to his draft. The draft was honoured by the bank, and with the proceeds Raynor released the shipment from the railway company and got possession of the cars.

It was, of course, very important for the plaintiff company to be satisfied from time to time that the cars in question were actually in Raynor's possession or control as security for the

advances made, and a system of car-checking was established, not only in regard to Raynor, but in regard to all dealers financed by the plaintiff company. This car-checking was, so far as the present litigation is concerned, at first done by the insurance brokers who negotiated the insurance policies sued on. Later on, by another arrangement, the details of which will be discussed shortly, the work of car-checking was entrusted to the defendant the Retail Credit Company Inc., the head office of which is at Atlanta, Georgia. Its business is to supply credit information of all kinds in regard to those whose affairs require investigation, and among other branches of its business it undertakes to give necessary information to concerns which carry on the kind of business conducted by the plaintiff. Its agent in Picton and Belleville was one O'Flynn, a solicitor. To him was entrusted the duty, pursuant to the agreement made between the plaintiff and this defendant, of personally examining each motor-vehicle on a list from time to time furnished by the plaintiff company to this defendant the Retail Credit Company Inc., on forms supplied by the latter, checking the serial number by personal examination, reading the speedometer, and certifying to his company that he had done these things himself and that the cars were on hand.

The agent failed entirely to carry out his instructions. He made a few perfunctory examinations, but in the great majority of cases he made no inspection at all, but accepted the word of Raynor's manager that the cars upon the list furnished to him, O'Flynn, were in fact in Raynor's garage, when in truth they were not.

Raynor became involved in financial difficulties, and his affairs about the 1st July, 1927, reached a climax, and it was found that out of a total of about 70 motor-vehicles financed in the manner described, and which should have been on the floor of Raynor's garage either at Belleville or Picton, not a single car remained. Reports had been sent in by Mr. O'Flynn from time to time to his head office, and by them forwarded on to the plaintiff company, to the effect that these cars were on hand and had been inspected by him, these reports covering a period of many weeks, and it was not until the date mentioned, some time early in July, that it was found that all the security which the plaintiff was entitled to have had disappeared.

Steps were immediately taken and the matter thoroughly investigated. Raynor was prosecuted and convicted, first having made an assignment in bankruptcy or been adjudged a bankrupt, but none of the cars, with possibly one exception, have been located, that is to say, located in such a way as to be of any advantage to

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Garrow, J. the plaintiff or the insurers. Many of them have been traced into the hands of innocent purchasers who have paid for them to Raynor, who fraudulently failed to account for the proceeds to the plaintiff.

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The plaintiff company was insured with the defendant the Merchants Casualty Company under policy No. 26119. This policy covered fire, theft, and "wrongful conversion or other wrongful appropriation or fraud committed by the dealer . . . in contravention of the security instrument." The policy recites that whereas the corporation, that is to say the plaintiff, purchases securities on motor-vehicles by purchasing, discounting, or otherwise acquiring the obligations received in connection therewith, and desires to have all motor-vehicles in which it may have an interest because of such purchase insured against certain hazards, therefore the company assures all motor-vehicles reported for coverage hereunder in respect to obligations which are now owned or may hereafter be acquired by the plaintiff.

The policy provided that all motor-vehicles should be reported by the plaintiff to the insurer or its agents as soon as possible following the purchase of the obligation, whereupon the liability of the company should attach in respect to any motor-vehicle so reported from the date of the execution of the obligation.

It also provided that the corporation might record or file all security instruments.

It further provided that for the protection of both the assured and insurer the motor-vehicles insured should be checked up each month, at the respective premises where they might be kept, by an inspector agreed upon by both parties, the expenses of this inspection to be borne by both parties equally.

It further provided that the insurer should supply the assured with a form of certificate signed and counter-signed by its duly authorised representative, to be issued by the insured, covering each individual motor-vehicle, the plaintiff to supply the agents through whom the policy was issued with such certificate in triplicate.

The insurance company by the policy further agreed to indemnify the plaintiff against "pecuniary loss because of the wrongful conversion or other wrongful appropriation or fraud or dishonesty committed by the dealer in contravention of the terms of the security instrument," and wrongful conversion is said by the terms of the policy, without limiting its usual interpretation, to include the disappearance of the motor-vehicle either permanently or temporarily.

The plaintiff company paid all proper premiums and in due

course, after the loss, furnished the insurance company with proofs of its loss and complied with all necessary conditions towards enforcing its claim for indemnity.

Dealing with the case against the Merchants Casualty Company, the loss claimed under this policy was originally \$9,495.36, the details of which are set out in para. 6 of the statement of claim, and the different transactions between the plaintiff company and Raynor making up this were gone into at the trial, except possibly in regard to one car. It was shewn that each of these cars was traced into Raynor's possession, that each of them became the subject of the note, the bill of sale, and the conditional sale agreement already referred to; that each of them was reported from time to time as being on Raynor's premises; that they were not paid for by Raynor to the plaintiff; and that, when the final crash came, it was found that each of them had disappeared and they have not since been recovered.

This defendant, like the other defendant, raises various defences in its statement of defence, but, as I understand the argument of its counsel, the only defence which was seriously contended for by him was to the effect that the method of financing, the details of which have been set out, was a mere sham; that it was the intent of the parties when the insurance was effected to protect the interest of the assured in securities acquired by it, that they should be real securities, and Mr. Shaver argued that what the plaintiff company was actually doing was lending money to Raynor on the security of the cars, and that the appropriate instrument to have taken as a security should have been a chattel mortgage, the filing of which upon completion would have protected the plaintiff company and the insurance company as well, instead of taking a bill of sale from Raynor, and giving him back a conditional sale agreement, which, filed or not, would not under the Conditional Sales Act protect any one against an innocent purchaser for value. (It appears that the bill of sale was not, but the conditional sale agreement was, filed.) But as against that argument I point out this, that the evidence of Major Windeyer, which I accept in all its details, indicated clearly that the insurance company knew exactly the method of financing, that detailed information of each transaction was furnished to the company from time to time, that the insurance company knew as much about the matter as the plaintiff itself did, and that it never at any time raised any objection. It does not, therefore, I think, lie in the mouth of the defendant company to take this objection at this stage.

It will be convenient at this point to refer somewhat in detail

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to the evidence of Major Windeyer, affecting as it does both the defendant companies. He was the broker who negotiated the insurance contracts. In the first instance the car-checking was done through his office, and that continued for a considerable period. Later, there was a change made whereby all cars outside of Toronto were to be checked by the Retail Credit Company. This was done some 6 or 8 months before the Merchants Casualty Company went off the risk. This new arrangement originated with the plaintiff, and not with Windeyer or the insurance companies. Windeyer saw the Retail Credit Company to satisfy his principal, the insurance company. He called at the office and interviewed the manager and told him he was representing the insurer of the plaintiff company and that he desired to get information as to how they did their work, and he was given that information. In March a change took place in the insurance, and the plaintiff company asked Windeyer to procure other coverage, which he did with the Western Assurance Company, and he negotiated the two contracts with the Western.

He was familiar throughout, he says, with the methods of business of the plaintiff with its dealers, and he gave this information to both insurers. He produced for the insurers the different forms used and explained the system in vogue, including the pink sheets attached to the bill of sale, the conditional sale agreement, and the notes. He also outlined to the insurance companies the methods of collection and inspection. All this was done before the insurance was effected, and when the Western came on the risk the then existing arrangement as to checking by the Retail Credit Company was explained to that company. All the car-check reports came through his hands, and he sent these on to the insurer. Early in July he heard about Raynor's default. He telephoned the Merchants Casualty Company and was authorised to employ one Fetterley, an adjuster, and to go to Belleville. He also notified the Western Assurance Company the same day, and that company took the same action and gave the same instructions.

On a Saturday early in July, these parties went to Belleville and took with them the records that Windeyer had in his possession and saw Raynor and found by inspection that all the cars had disappeared, Raynor saying that they had been sold and the proceeds not accounted for.

On cross-examination he said to Mr. Shaver that Mr. O'Grady, manager of the plaintiff company, asked him if he, Windeyer, would be willing to have the inspection made by the Retail Credit Company in future in place of by Windeyer and Donaldson. He,

Windeyer, discussed this with the Merchants Casualty Company, and was asked to investigate the methods of inspection by the Retail Credit Company and report, and, if he was satisfied upon investigation and would so recommend, the proposed change would be adopted. He investigated and reported favourably accordingly, On this investigation he was shewn forms similar to those appearing in exhibit 14, and was told that the Retail Credit Company required the first two columns of these forms to be filled up by the customer, the plaintiff. He stated that his insurers required to have reports twice each month as to the location of the cars, and he was told that the agents employed by the Retail Credit Company were reputable, first-class men.

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Again, looking at exhibit 14, which is a series of car-checking reports furnished by the Retail Credit Company, he says that all these sheets went through his hands and were sent on to the insurance companies, and he adds that they never missed getting the regular fortnightly report. He explained further that at the inception of the contract of the Merchants Casualty Company the plaintiff company had not taken a bill of sale but only a conditional sale agreement, and that later a bill of sale was taken, and that he was informed of this change.

To Mr. McCarthy on cross-examination he stated that the first notification that the insurer would receive of a purchase by Raynor would be duplicate slips attached to exhibit 8, called "Automobile Dealers' Certificates." One of these was retained by Windeyer and Donaldson, and the other sent on immediately to the insurer. When the car or cars covered by these certificates were sold and paid for, Windeyer would see that he would get back the plaintiff company's copy of the certificate marked "cancelled," which he would then send on to the insurance company after computing the premium.

After the Western Assurance Company came on the risk Windeyer continued to act as theretofore and signed certificates for it as its agent.

On further cross-examination by Mr. Hellmuth, Windeyer said that he did not think that the Retail Credit Company was notified when the Western Assurance Company took the place of the Merchants Casualty Company. At any rate it was not notified by him, nor did he tell the Retail Credit Company that the insurance company was paying half the costs of the inspection.

As I have already said, I accept the evidence of Major Windeyer *in toto*, and in view of his evidence, which to my mind makes it quite clear that the Merchants Casualty Company was thoroughly aware of the whole situation, that it had been furnished from

Garrow, J. time to time with all the documents which it was entitled to receive in connection with each transaction, that it knew the method of financing, and that there was no fraud or concealment on the part of the plaintiff company, I am of the opinion that the defendant is liable to the plaintiff under the policy of insurance in question.

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MERCHANTS CASUALTY INSURANCE Co. As already stated, the details of the various transactions in which the Merchants Casualty Company is concerned were gone into and to my mind were proved, with the exception possibly of one car, namely, the Mastin car.

As to the case made against the defendant the Western Assurance Company, the contract with that company is in the form of two documents, exhibits 2 and 3, exhibit 2 being policy No. 700,000, called "wholesale policy," and exhibit 3 being policy No. 3695, called "bond for wholesale conversion," and attached to this latter document is a letter from this defendant dated the 3rd May, 1927, addressed to the plaintiff, in which are set out certain interpretations agreed upon between the parties as to the terms of these policies. In this latter document it is provided that automatic coverage is to be given to the plaintiff, which is understood to mean that just as soon as the purchaser signed the conditional sale contract and accepted delivery of a motor-vehicle from a dealer, or in the case of a wholesale transaction forthwith on a dealer signing the documents, "our coverage attaches." No specific statement on the company's form shall be required to make the coverage go into effect. The method by which the company is to be notified of liability shall be the sending of wholesale certificates and copies of the retail conditional sale agreement by the plaintiff to the company.

The document further provides that fraud on the part of the dealer or purchaser shall be held to constitute a valid claim; that wrongful conversion shall, without limiting the usual interpretation of the same, include the disappearance of the motor-vehicle either permanently or temporarily; and that any warranty made by the plaintiff shall apply only to matters within its knowledge.

I think it probable, indeed it seems to have been conceded, that some of the clauses contained in one of the above mentioned policies should really have been inserted in the other. I do not think it is of much importance, or, if it is, it is a matter as to which the plaintiff should be given leave to amend as may be advised. Both policies were issued at the same time, and in one or other of them or in the letter of interpretation are to be found at least as wide clauses and provisions as appear in the contract with the Merchants Casualty Company.

Policy No. 3695 provides for indemnification against wrongful conversion amounting to larceny or embezzlement of any motor-vehicle reported for coverage hereunder represented by obligations now owned or hereafter acquired and sold, whether absolutely or conditionally.

It provides that the assured shall furnish the company, on the company's form, a statement truthfully completed and signed by the dealer, and the liability of the company shall not commence until the company shall have signified its acceptance for inclusion under this bond of such purchaser. This clause is modified by the clause already referred to in the letter of interpretation.

Policy No. 700,000 provides by clause 10 that in consideration of the premiums and the stipulations contained in the policy the company insures all motor-vehicles reported for coverage hereunder in respect to obligations which are now owned or may hereafter be acquired by the assured.

Clause 13 provides that all motor-vehicles shall be reported by the corporation to the company as soon as possible following the purchase of the obligation, whereupon the liability of the company shall attach in respect of any motor-vehicle so reported from the date of the execution of the obligation.

Counsel for this defendant rested his defence chiefly upon the following considerations. He contended that the evidence disclosed that Raynor's true financial situation must have been known to the plaintiff at a time prior to the 31st March, 1927, the date upon which this defendant went on the risk; that at that time Raynor's wholesale line of credit was over \$61,000; that he had 21 new cars on hand, valued at over \$22,000; that he had approximately 24 new cars reported as sold, the proceeds of which had not been paid over to the plaintiff. But the evidence of O'Grady indicates that on the 31st March Raynor's account was, as they believed, in good condition, and that their records at that time shewed no arrears on any wholesale car.

He also contended that, notwithstanding the admittedly false statements contained in the car-checking reports, upon which all parties relied, yet the plaintiff should be taken to have realised from these reports that the situation was something different from what was indicated, that Raynor was actually selling cars and not paying for them, or that cars reported as being on hand were not actually so, and that the plaintiff company should thus have been put upon inquiry, with the result that the loss would have been stopped at an early date.

I am unable to see in this case, just as in the other, how the insurance company is entitled to say that the plaintiff should be

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charged with a greater degree of knowledge as to the situation than the insurance company itself had. The insurance company received the same documents which the plaintiff received, and nothing in them apparently alarmed the insurer or was sufficient to place it upon inquiry.

It is also contended that O'Grady's visit on the 18th June to O'Flynn indicated a knowledge on the part of O'Grady that things were not all that they should have been. I cannot reach that conclusion from the evidence. O'Grady said he was going on a vacation, and before going he wished to visit a number of their customers and ascertain how their affairs were progressing. There was no more than that to it. There was nothing at that time, so far as I can gather from the evidence, which indicated any default on Raynor's part, nor any default on the part of O'Flynn. It is true that O'Grady asked O'Flynn to make a check on the occasion spoken of, saying that he would call for it, and that he failed to do so. I do not know that it would have made any difference if he had waited for it, since the check which O'Flynn made was as misleading as the earlier ones. He had no reason whatever to suppose at that time that the contract made with the Retail Credit Company to make fortnightly examinations of the cars in question, a contract which the insurance company knew all about, was not being strictly lived up to.

It was further contended on behalf of this defendant that if, as is contended by the Retail Credit Company, the Commercial Finance Corporation has released all its rights under and by virtue of a document hereinafter referred to, exhibit 9, by doing so it thereby released the insurance company from any liability under the policy. This argument fails, because I hold, as hereinafter explained, that the plaintiff company did not release the Retail Credit Company.

Then a further argument is, as I understand it, that the plaintiff company in making this contract with the Retail Credit Company should have seen that the latter also contracted with the insurance company. I do not know upon what ground that can be said. The insurance company is itself asserting, in its third party procedure against the Retail Credit Company, that it contracted with the latter company for car-checking reports. I hold, as appears later, that it did not, but I fail to see on what ground the plaintiff is responsible for this. At any rate, as I also point out later, the insurance companies are upon payment entitled to be subrogated to the rights of the plaintiff company against the Retail Credit Company.

It was also submitted that, if the effect of the contract between

the Commercial Finance Corporation and the Retail Credit Company was only that the Retail Credit Company was to obtain a report from a reputable person, this did not afford proper protection to the insurance company and should relieve it from the obligation of the policy. As appears later, I find that the contract between the plaintiff and the Retail Credit Company was much wider than this, and this argument too, in so far as it constitutes a defence to the plaintiff's claim, fails in my opinion.

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It was also contended by counsel for the insurance company that as to a number of the cars in respect to which claim was made, they were not covered by the policies or either of them, because they have not actually been traced into Raynor's garage. I do not think that is necessary. I would hold that all that is necessary to make the defendant liable is to shew that the motor-vehicles claimed for were in the legal possession or control of Raynor at one time; that he signed a promissory note, a bill of sale, and a conditional sale agreement in respect of them; that each of these cars was duly reported for coverage to the defendant by the plaintiff; that premiums were duly paid; and that the cars subsequently disappeared owing to the fraud and default of Raynor. There are certain cars the documents in regard to which were signed on the 31st March, the day before this defendant went on the risk, but were not reported for coverage until a later date. I would hold that these cars are covered by this policy as well as cars, if any, which may have been delivered to purchasers by Raynor direct from the railway company's possession without first going into his garage.

As to the position of the Retail Credit Company, both as between the plaintiff and it and as between the two insurance companies and it, the evidence of Mr. O'Grady, general manager of the plaintiff company, indicates that the agreement with the Retail Credit Company was entered into in the year 1925. Mr. O'Grady had met Mr. Hill, of the Retail Credit Company, in Muskoka, in July of that year. A few days later, Hill called on Mr. O'Grady in Toronto, and proposed to him that the plaintiff company should take advantage of their services in the way of furnishing personal reports, as well as car-checking reports, although as to the latter it was stated by Mr. O'Grady that he would probably not be calling upon the Retail Credit Company for these for some little time. At this time it was arranged that the Retail Credit Company should furnish reports as called for, and on Mr. Hill's return to his head office at Atlanta, Georgia, he wrote the letter exhibit 10 and gave directions that the forms referred to therein should be furnished to the plaintiff company. On

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the occasion of his interview with Mr. O'Grady in Toronto, the document exhibit 9 was signed by the plaintiff company, the document which is chiefly relied upon by the Retail Credit Company as absolving it from any liability in respect of the car-checking reports.

It is contended by counsel for the Retail Credit Company that, quite apart from this document, exhibit 9, all that the Retail Credit Company was required to do was to obtain a report, when called upon by the plaintiff company, from a person or persons of good reputation, and that, having done so, there was no further obligation on its part, no matter how false the information might be which was furnished, and he further contended that, if this were not so, nevertheless the document exhibit 9 relieves it from liability.

This document provides, among other things, that the information to be furnished shall be treated in confidence, that the plaintiff company will not disseminate or transmit the same, directly or indirectly, to the person reported upon or to any other person unless in the employ of the plaintiff in such capacity as to make it necessary that he should know the information for the plaintiff's protection and benefit.

It further provides that the plaintiff company agrees to hold the Retail Credit Company harmless on account of any damages which may arise from the publication or dissemination of information contrary to this agreement, and finally it states as follows: "In consideration of receiving this service and as a condition of its rendition, the undersigned agrees that neither the Retail Credit Company nor its employees shall be responsible for any loss that may occur to the undersigned through the use of the information furnished."

Dealing first then with the position of the Retail Credit Company apart from exhibit 9, I do not agree with the argument that the contract between the plaintiff and the Retail Credit Company was merely that the latter was to employ a person or persons of good standing to make these reports, and that that was the whole contract. No doubt, that was mentioned as a piece of self-advertising on the part of the Retail Credit Company, but the gist and substance of the agreement was this, that the Retail Credit Company would, through some means or other, furnish the plaintiff with reliable information in regard to the whereabouts and condition of the motor-vehicles in question. The Retail Credit Company knew perfectly well the nature of the business being carried on by the plaintiff company. This is indicated clearly by exhibit 34, which is a form of instruction sent out to its agents and re-

ceived by O'Flynn. This document states that the dealer, that is in this case Raynor, has used finance facilities to purchase the cars listed, that the finance company, the plaintiff, holds paper against each car, that the finance company "wants us to check the position and condition of the car." It goes on to instruct the agent as to checking the serial number, and warns him that "unless you personally see the number on the car this report may misinform and mislead our customers instead of protecting them." Clearly from this document the Retail Credit Company knew what the situation was, knew the value of the reports which it was making, appreciated the importance of them, and so instructed its agent.

As already pointed out, notwithstanding these instructions, O'Flynn failed almost from the very beginning to do his duty. He reported over and over again that he had seen cars which he had not seen at all, that he examined serial numbers which he did not examine, that cars were on the floor of Raynor's garage which were not there and had not been for weeks, and all this information he certified over his own signature and sent it to his company, who in turn completed the forms and sent them on to the plaintiff. The information in fact could not have been more misleading had the Retail Credit Company deliberately set out to deceive the plaintiff, and I have little doubt that the greater part, if not the whole, of the loss suffered by the plaintiff is to be attributed to the failure on the part of the Retail Credit Company to do what it contracted to do. Evidence was given that O'Flynn was a reputable person. I do not mean to say that he in any sense deliberately intended to defraud any one, or to deceive any one, but he knew and the Retail Credit Company knew that the latter was under a legal obligation to furnish reliable information, and he furnished instead misinformation of the most damaging character, utterly reckless and careless of whether it was true or false, obtained in fact from the very persons in whose interest it was to deceive him.

In my opinion, this situation leaves the Retail Credit Company liable to the plaintiff for the damages suffered. I rely in support of this conclusion upon the case of *Low v. Bouverie*, [1891] 3 Ch. 82, where it was held that the doctrine laid down in *Derry v. Peek* (1889), 14 App. Cas. 337, to the effect that a person is not liable for a false representation upon the faith of which another person acts even though carelessly made, provided he made it with honest belief that it was true, does not apply where there is a legal obligation on the part of one person towards another to give him correct information.

Then does exhibit 9 relieve the Retail Credit Company from

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this liability? In my opinion, it does not. It appears to me that this document has reference only to reports as to commercial credit, personal standing, etc., and has no reference to the car-checking reports, which formed a separate and distinct part of the Retail Credit Company's service. Even if this document applied to car-checking reports, I think it was within the right of the plaintiff company, in the very terms of the agreement, to pass on the information to the insurance companies. Furthermore, the damages which have arisen have not arisen from the publication or dissemination of the information contained in the reports at all, or from the careless handling of the reports, nor has the loss which the plaintiff suffered occurred through the use of the information furnished, the loss being in fact attributable, not to the use of the information, but to its absolute falsity.

I would hold therefore that the Retail Credit Company is liable to the plaintiff company for the loss which has been sustained, the exact amount of which cannot be determined until the Master shall have made his report upon the reference which I propose to direct.

Each of the insurance companies, as already stated, claims over against the Retail Credit Company by way of third party proceeding. To establish this claim it would be necessary on the part of each of the companies to shew that there was a contract, express or implied, between each of them and the Retail Credit Company. I do not think that has been shewn in either case. True, Major Windeyer called on the Retail Credit Company and explained to it that he was acting for the insurance company, but this is not sufficient to create any privity of contract between the Merchants Casualty Company and the Retail Credit Company, and at the time this interview took place the Western Assurance Company was not on the risk at all. It is also true that the insurance companies each paid one-half the cost of the fee charged by the Retail Credit Company to the plaintiff; but this was a payment made as between the insurance companies and the plaintiff, and was not a matter with which the Retail Credit Company was concerned.

I am unable to hold, therefore, that there is any direct right of contribution over, as between the Credit Company and the insurance companies. I do not know, however, that it is of much importance, because undoubtedly, upon payment of the plaintiff's claim as now or hereafter ascertained, the insurance companies are entitled to stand in the shoes of the plaintiff as against the Retail Credit Company.

There will therefore be a reference to the Master to determine, first, as between the plaintiff and the defendant the Merchants

Casualty Company, the liability of the latter, if any, in respect of the Mastin car. If such liability is not found, there will be judgment for the plaintiff for the amount claimed in the statement of claim less the value of that car, otherwise judgment will be entered for the full amount claimed with costs of action. The third party issue as between this defendant and the third party is dismissed with costs; the defendant, upon payment, to be subrogated to the rights of the plaintiff as against the Retail Credit Company. Costs of the reference reserved until the Master shall have made his report.

There will also be a reference to the Master to determine the extent of the liability as between the plaintiff and the Western Assurance Company and judgment will be entered for the amount so found with costs of the action and of the reference. The third party issue between this defendant and the Retail Credit Company is also dismissed with costs, and this defendant too is, upon payment, entitled to be subrogated to the rights of the plaintiff as against the Retail Credit Company. In both instances the facts necessary to determine liability will be those already indicated.

The reference will also include an inquiry as to the extent of the liability of the Retail Credit Company. It was contended by counsel for the plaintiff that it would have been sufficient as against that defendant to shew one instance of a falsely reported car, on the theory that the plaintiff was lulled into security by the first false report, which, if it had truly stated the facts, would have put the plaintiff upon inquiry and avoided the larger part of the loss. But this, I think, is going too far. The evidence, however, shews conclusively, as already stated, that the majority of the cars were either once or oftener reported falsely, and I think the whole series of reports was so misleading that I am justified in directing judgment to be entered for the total loss of the plaintiff, less the value of such cars, if any, as the defendant may be able to shew on the reference were truly reported throughout.

The defendants and the third party appealed from the judgment of GARROW, J., in each of the actions.

May 14, 15, and 16, 1930. The appeals were heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

Hellmuth, K.C., and *J. R. Cartwright*, for the defendant and third party the Retail Credit Company Inc., appellant. The trial Judge erred in not holding that this appellant company was relieved from liability under the written agreement signed by the plaintiff. The service of this appellant covered the furnishing of character and financial reports as well as checking the cars in the

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hands of the debtor. It was in consideration of this service that the appellant was relieved of liability from loss suffered by its principal from the use of the reports. There was only one contract covering all the services. The fact that the car-check reports were not at first required does not make the furnishing of such reports at a later date a new service or a new contract. By the agreement this appellant had contracted itself out of all loss from negligence in compiling the reports. The trial Judge also erred in not holding that this appellant had discharged its duty to the plaintiff by employing and properly instructing a reputable agent of undisputed character to make the reports required. It was the duty of this appellant to have the reports as correct as possible. But when the employment of an agent was necessary, as the plaintiff was aware, and all reasonable precautions were exercised by this appellant to secure a reliable agent and to provide accuracy in the report, then the plaintiff, under the agreement was to assume responsibility for the fallibility of the human element: *Porter & Sons v. Muir Brothers Dry Dock Co. Ltd.* (1929), 63 O.L.R. 437, at p. 461; *Turner v. Civil Service Supply Association*, [1926] 1 K.B. 50; *Barwick v. English Joint-Stock Bank* (1867), 36 L.J.N.S. Ex. 147; *Lloyd v. Grace Smith & Co.*, [1912] A.C. 716. The trial Judge also erred in holding that the defendant the Western Assurance Company would, on payment to the plaintiff, be entitled to be subrogated to the rights of the plaintiff, if any, against this appellant. The right of subrogation is confined to tort. There there is an alleged breach of contract merely. The liability is on two separate contracts. Neither one is surety for the other.

Grant, K.C. (with him *Frost*, K.C.), for the plaintiff company in the second action, and (*Fraser Grant* with him), for the plaintiff company in the first action, respondent. At the time the indemnity agreement was signed, the appellant credit company furnished only character reports. The car-check reports were not asked for until a year later. The form of the agreement is not applicable to the making of car-check reports, because no action could possibly arise in that regard involving the credit company because it is simply a matter of fact: *S. Pearson & Son Ltd. v. Dublin Corporation*, [1907] A.C. 351. The credit company might have drawn a contract wide enough to relieve it from liability for the negligence or fraud of its servant. But that has not been done here: *Toronto General Trusts Corporation v. Canadian National Railway Co.* (1929), 64 O.L.R. 622; *Richmond v. Savill*, [1926] 2 K.B. 530. The release in para. 3 is from the use of reports honestly furnished. It is a release only from what was in the

contemplation of the parties: *Lyall v. Edwards* (1861), 6 H. & N. 337. It was not in contemplation that fraudulent reports would be furnished: *Joseph Travers & Sons Ltd. v. Cooper*, [1915] 1 K.B. 73. Therefore the reporting company is fixed with the fraud of its servant. The words "however caused" are missing from this document. "Any kind" refers to the kind of loss. "However" refers to the cause and must appear to cover the negligence or fraud of a servant.

Gordon Shaver, K.C., for the defendant the Merchants Casualty Insurance Company, appellant. The agreement between the appellant and the plaintiff was clearly an indemnity agreement. Therefore the insurer on paying the risk is entitled to every right arising to the insured: *Welford's Accident Insurance* (1923), p. 356; *Castellain v. Preston* (1883), 11 Q.B.D. 380, at p. 388; Ontario Insurance Act, R.S.O. 1927, ch. 222, sec. 169, and sec. 175, statutory condition 12. The contract insures against loss by conversion. Taken as a whole, it contemplates periodical inspection in order to protect both the plaintiff and the insurer. This service was undertaken by the credit company, and the cost shared by the plaintiff and the insurance company. The cause of action of the plaintiff is breach of contract, and the measure of damages is the loss through conversion. The insurer is liable for such loss and therefore entitled to subrogation. The two causes of action need not be the same. It is sufficient if the subject-matter is the same. Reference to *Darrell v. Tibbitts* (1880), 5 Q.B.D. 560; *West of England Fire Insurance Co. v. Isaacs*, [1896] 2 Q.B. 377, [1897] 1 Q.B. 226; *Globe & Rutgers Fire Insurance Co. v. Truedell* (1927), 60 O.L.R. 227, at p. 237; *Hutton v. Toronto Railway Co.* (1919), 45 O.L.R. 550, at p. 562; *Phoenix Assurance Co. v. Spooner*, [1905] 2 K.B. 753; *Burnand v. Rodocanachi* (1882), 7 App. Cas. 333; *Halsbury's Laws of England*, vol. 17, p. 490, para. 972, p. 492, para. 973, p. 518, para. 1023; *Bunyon on Fire Insurance*, 7th ed., p. 259.

Hughes, K.C., for the defendant the Western Assurance Company, appellant. Subrogation does not depend upon an identical cause of action as may be the case in set-off: *Porter on Insurance*, 6th ed., p. 234. The only limitation is that the right must be incident or attached to the ownership of the thing insured. The documents filed made the plaintiff company the absolute owner of the cars. It sought to protect that ownership, as to disappearance, in two ways: (1) by the insurance policy; (2) by the contract with the credit company for periodical checking: *Porter's Laws of Insurance*, 6th ed., p. 234; *Hutton v. Toronto Railway Co.*, *supra*; *Globe & Rutgers Fire Insurance Co. v. Truedell*, *supra*.

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Hellmuth, K.C., in general reply. The action against the credit company is for breach of duty entirely separate and distinct from the claim against the insurance companies for conversion. Subrogation is limited to rights arising out of the same subject-matter. Paragraph 3 of the agreement is not in any sense an indemnity clause; it is a release from any loss—an independent covenant having no relation to the preceding paragraphs. The words “any loss which may occur” are just as wide as the words “however caused” to relieve from liability. Reference to *Rutter v. Palmer*, [1922] 2 K.B. 87, at p. 90; *Porter & Sons v. Muir*, *supra*.

June 23. HODGINS, J.A.:—Appeal by the Retail Credit Company and by both insurance companies from the judgments of Mr. Justice Garrow, dated the 9th day of December, 1929, in each of the above named actions. The learned trial Judge found for the plaintiff against the Retail Credit Company for an amount to be ascertained by the Master of this Court in the one case, and in the other for the sum of \$9,495.36, less the value of certain automobiles which the defendant in that case might be able to shew were truly reported throughout. In each case he declared that the insurance companies, upon payment of the whole or any part of the plaintiff's claim against them, were entitled to subrogation, to the extent of such payment, to the plaintiff's right against the Retail Credit Company.

There was also an appeal by the Merchants Casualty Company seeking to hold the Retail Credit Company directly liable to it for breach of an alleged agreement collateral to its policy, in relation to the risk thereby undertaken, which appeal was dismissed on the hearing.

The main appeal was naturally by the Retail Credit Company, who had agreed with the plaintiff to furnish it with reports from time to time as to the whereabouts of the cars upon which the plaintiff was advancing money under certain agreements with a dealer in automobiles in Belleville named Raynor. The object of these reports, of course, was to assure the plaintiff that the motor-cars which it was financing for Raynor, under the agreements with him, were and remained either in his garage in Belleville or elsewhere under any sale by him, so that the plaintiff company might feel secure in regard to the whereabouts of the various cars which formed its security from time to time.

The learned trial Judge says, and I agree with him:—

“The gist and substance of the agreement was this, that the Retail Credit Company would, through some means or other, furnish the plaintiff with reliable information in regard to the whereabouts and condition of the motor-vehicles in question.”

Exhibit 34 contains the formal instructions sent out by the Retail Credit Company to its agents generally, and these instructions were received by O’Flynn, who was its agent in this particular case. This document states in effect that the dealer (that is, in this case, Raynor) has used the plaintiff’s finance facilities to purchase cars listed; that the plaintiff holds paper against each car; that the Commercial Finance Corporation “wants us to check the position and condition of the car,” and it goes on to instruct the agent as to checking the serial number and warns him that unless he personally sees the number on the car his report may misinform and mislead customers instead of protecting them. Clearly from this document the Retail Credit Company knew what the situation was, knew the character of the reports that it was making, appreciated the value and the importance of them, and so instructed its agent.

Consideration of the transactions entered into between the plaintiff and Raynor and a perusal of the documents themselves amply justify the learned Judge’s view, and it is incredible that with that knowledge there should be any doubt as to the duty and responsibility of the Retail Credit Company and the purpose for which the reports, which they were to make, were made. There was a complete breach of contract through the neglect, default, and fraud of O’Flynn, who made reports which not only cannot be justified but shew that, with knowledge of the seriousness of what he was doing, he continued to make reports which had no foundation in fact and were not based on his own knowledge and were not true.

Whether or not the plaintiff can recover on the ground of negligence in the duty of supplying correct reports, which it was the Retail Credit Company’s duty under the contract to make, or whether it succeeds because the agent employed by that company acted fraudulently within the scope of his duty, would not in this action be a matter of much consequence but for the defence set up. That defence is that by reason of an undated contract, exhibit 9, signed by the manager of the plaintiff, the Retail Credit Company was absolved from responsibility for any loss that might occur through the *use* of the information furnished. That undated agreement is as follows:—

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"INDEMNITY AGREEMENT.

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"To—Retail Credit Company,

"Atlanta, Georgia.

"It is agreed that the information furnished by you, in accordance with this agreement, shall be treated in confidence; that the undersigned will not disseminate or transmit the same directly or indirectly to the person reported on, or to any other person, unless he be in our employ in such capacity as to make it necessary that he know such information for our protection and benefit.

"The undersigned agrees to hold the Retail Credit Company, and its employees, harmless on account of any damages which may arise from the publication or dissemination of information contrary to this understanding, or from the careless handling of any such reports.

"In consideration of receiving this service, and as a condition of its rendition, the undersigned agrees that neither the Retail Credit Company, nor its employees, shall be responsible for any loss that may occur to the undersigned through the use of the information furnished."

It is said that the last paragraph has the effect which I have mentioned. That that cannot be so seems to me to follow from a consideration of the purpose for which the reports were required. It is difficult to conceive that any company asking for reports upon the whereabouts and condition of automobiles on which they had a claim, which they might at any time lose or find difficulty in enforcing should the automobiles disappear, was at one and the same moment making an agreement with a company to pay it for the furnishing of reports on which it could rely and act, and at the same time absolving the company from any loss that might occur through the very *use* which was necessarily contemplated by both parties and for which the plaintiff was to pay.

Apart from that consideration, it seems to me that exhibit 9 is, when considered, a special agreement dealing wholly with a possible use which might be made of the information, so far as outsiders were concerned, and had no reference to the use by the plaintiff of the information contained in the reports for the purposes of the business out of which originated the contract with the Retail Credit Company. It is only necessary to look at the agreement itself to be satisfied that it deals only with the dissemination or transmission of the information, either directly or indirectly, to the person reported on or to some other person, and that that is the use referred to in the concluding clause of the agreement. It is agreed that information is to be treated in confidence, but that

expression in no way hampers the full use by the person obtaining it so far as it affects him, and it is only its unnecessary disclosure to others, due to carelessness or a disregard of their confidential nature, that is guarded against.

For these reasons, I think that the appeal of the Retail Credit Company from the judgment against it should, in each action, be dismissed with costs.

The Retail Credit Company, however, raised an important objection to the scope of the judgment in relation to the insurance companies, arguing that they were not entitled to subrogation, as the happening of the risks against which the plaintiff was to be indemnified gave rise to entirely different causes of action from those on which the plaintiff might establish its claim against the Retail Credit Company.

Let us examine the policies. That of the Merchants Casualty Company provides as follows:—

"10. Now therefore this indenture witnesseth that in consideration of the stipulations herein contained and of the premium provided, the company does hereby insure the assured, as their respective interests may appear, against loss or damage as herein provided, upon all motor-vehicles reported for coverage hereunder in respect to obligations which are now owned or may hereafter be acquired as aforesaid by the corporation, said insurance to be as herein set out."

The perils insured against, so far as they are relative to this case, are as follows:—

"Theft or robbery (except by any persons in the assured's service or employment, whether the theft or robbery occur during the hours of such service or not). Pecuniary loss because of the wrongful conversion or other wrongful appropriation or fraud committed by the dealer or manufacturer in contravention of the security instrument."

There are further conditions which it is not necessary to set out in full, but one provides that:—

"Wrongful conversion shall, without limiting the usual interpretation of same, include the disappearance of the motor-vehicle either permanently or temporarily."

The policy also expressly covers "wrongful conversion or other wrongful appropriation or fraud or dishonesty committed by the dealer in contravention of the terms of the security instrument."

From the above it is evident that the loss to be indemnified against must be due to theft or robbery or due to wrongful conversion, wrongful appropriation by the dealer, fraud committed by the dealer or manufacturer, or dishonesty in contravention of

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the terms of the security instrument. Wrongful conversion is amplified in the coverage so as to include the disappearance of a motor-vehicle either permanently or temporarily.

The defendant the Western Assurance Company made a contract in the form of two documents, exhibits 2 and 3, exhibit 2 being a wholesale policy, and exhibit 3 being a bond, attached to which is a letter from the company addressed to the plaintiff setting out certain interpretations agreed upon by the parties as to the terms of these documents.

I agree with the learned trial Judge that there are, in these documents, to be found "at least as wide clauses and provisions as appear in the contract with the Merchants Casualty Company." There is no doubt that Raynor converted or wrongfully appropriated the cars covered by the plaintiff's securities and committed in his dealings a fraud of considerable magnitude against the plaintiff. According to the learned trial Judge:—

"It was shewn that each of these cars was traced into Raynor's possession, that each of them became the subject of the note, the bill of sale, and the conditional sale agreement already referred to; that each of them was reported from time to time as being on Raynor's premises; that they were not paid for by Raynor to the plaintiff; and that, when the final crash came, it was found that each of them had disappeared and they have not since been recovered."

The liability of the insurance companies depends upon whether there was wrongful conversion or other wrongful appropriation, or fraud or dishonesty committed by the dealer, in contravention of the terms of the security instrument, including the disappearance of the motor-vehicles either permanently or temporarily. This is substantially the basis upon which the plaintiff recovers against the insurance companies.

Undoubtedly the cause of action upon which the plaintiff recovers against the insurance companies is different from the cause of action upon which the plaintiff recovers against the Retail Credit Company, but it is a mistake to suggest that that difference defeats the right of subrogation. Indeed such a contention entirely loses sight of the fact that the right of subrogation depends upon whether recovery upon a cause of action by the insured is a means of diminishing the loss against which the insurer has agreed to indemnify the insured. Subrogation is the right to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss. In other words, in dealing with subrogation, what the insured recovers against a third party must be credited upon or allowed against the

amount sought to be recovered from the insurance company, if it is such that if he retain it he will be paid twice over. In this case, if, by reason of the breach of contract or the fraud of the agent of the Retail Credit Company, an amount is recovered on a cause of action which recoups the plaintiff in part or in whole for its loss, and it seeks to recover that loss from the insurers, it is bound to credit upon its claim against them what it so received, in whole or in part. The true test is, as stated by Lord Justice Bowen in *Castellain v. Preston*, 11 Q.B.D. 380, at p. 404, "Can the right to be insisted on be deemed to be one the enforcement of which will diminish the loss?"

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Lord Sterndale, M.R. (then Pickford, J.), followed and applied this test in the case of *Assicurazione Generali de Trieste v. Empress Assurance Corporation Ltd.*, [1907] 2 K.B. 814. In that action the plaintiffs, who were re-insurers of the defendants' interests in certain shipments of lumber in respect of two vessels, had paid the defendants the full amount called for by the re-insurance contract. They afterwards sued for the repayment of the amount recovered, on the ground that, after their payment, the defendants had received from the shipowners damages for fraudulent misrepresentation by reason of which they, the defendants, had been induced to pay losses in respect to interests on these declared vessels. These losses were the basis of the plaintiffs' payment to the defendants. The case, an important one, was argued by Scrutton, K.C. (now Scrutton, L.J.), and by Hamilton, K.C. (now Lord Sumner). The contentions are set out by Pickford, J., thus (p. 819):—

"The plaintiffs contend that, as this money was obtained by enforcing a right which diminished the defendants' loss, it was received to the use of the plaintiffs as re-insurers, and they rely upon the judgments of Brett, L.J., and Bowen, L.J., in *Castellain v. Preston*, 11 Q.B.D. 380. The defendants contend that these judgments do not apply to this case, as they say that this was money received in respect of a personal tort committed by a person other than the original assured, and was not received in diminution of their loss; and Mr. Hamilton, on behalf of the defendants, compared this case to that of an action for libel published incidentally in, and arising out of, the insurance transaction."

His decision was that the plaintiffs' contention was correct and that the passages cited from the *Castellain* case were binding on him and were right, and covered the case. He said (pp. 820, 821):—

"I think therefore that this money was received by reason of the enforcement of a right which diminished the defendants' loss,

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and therefore is within the judgments I have mentioned and covered by their authority."

The question of the meaning and extent of the subrogation has been considered by this Court in *Hutton v. Toronto Railway Co.*, 45 O.L.R. 550 (affirmed in *Toronto Railway Co. v. Hutton* (1919), 59 Can. S.C.R. 413) and in *Globe & Rutgers Fire Insurance Co. v. Truedell*, 60 O.L.R. 227. In these reports many cases are discussed and dealt with, and therefore it is not desirable to refer to them again unless they touch the exact point here in issue.

In *National Fire Insurance Co. v. McLaren* (1886), 12 O.R. 682, 687, the late Chancellor Boyd has stated his view of the principle under consideration:—

"The doctrine of subrogation is a creature of equity not founded on contract, but arising out of the relations of the parties. In cases of insurance where a third party is liable to make good the loss, the right of subrogation depends upon and is regulated by the broad underlying principle of securing full indemnity to the insured, on the one hand, and on the other, of holding him accountable as trustee for any advantage he may obtain over and above compensation for his loss."

In the *Castellain* case, already referred to, Lord Esher (then Brett, L.J.) elaborates the doctrine in these words (11 Q.B.D. at p. 388):—

"This doctrine of subrogation must be carried to the extent . . . that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been diminished."

He adds (p. 387): "It is a doctrine in favour of underwriters or insurers in order to prevent the assured from recovering more than a full indemnity."

And again (pp. 389, 390): "I go further and hold that if a right of action in the assured has been satisfied, and the loss has been thereby diminished, then, although there never was nor could be any right of action into which the insurer could be subrogated, it would be contrary to the doctrine of subrogation to say that the loss is not to be diminished as between the assured and the insurer by reason of the satisfaction of that right."

This situation he makes more clear in another part of his judgment, where he refers to *Darrell v. Tibbitts* (1880), 5 Q.B.D. 560, 567 (in which he had taken part). He says (p. 391):—

“It seems to me that in *Darrell v. Tibbitts* the insurers were not subrogated to a right of action or to a remedy. They were not subrogated to a right to enforce the remedy, but what they were subrogated into was the right to receive the advantage of the remedy which had been applied, whether it had been enforced or voluntarily administered by the person who was bound to administer it. That seems to me to be the doctrine.”

He further deals very clearly with the point involved in the case at bar, in the following passage (p. 392) in which he speaks of the judgment of Chitty, J., in the Court below:—

“I will not go further with the judgment of Chitty, J., except to say this, that at the end my learned brother has put it thus, that ‘the only principle applicable is that of subrogation as understood in the full sense of that term.’ There I agree with him, only my view of the full sense is larger than that which he adopted. ‘And that where the right claimed is under a contract between the insured and third parties, it must be confined to the case of a contract relating to the subject-matter of the insurance, which entitled the insurers to have the damages made good.’ I think it would be better expressed in this way—‘which entitles the assured to be put by such third parties into as good a position as if the damage insured against had not happened.’ If it is put in that sense it seems to me to be consistent with the proposition which I laid down at the beginning of what I have said, and to cover this case. I will repeat it, ‘which entitles the assured to be put by such third parties into as good a position as if the damage insured against had not happened.’”

Lord Cairns in *Simpson v. Thomson* (1877), 3 App. Cas. 279, at p. 284, does the same in a few words: “Where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed *to all the ways and means by which* the person indemnified might have protected himself against or reimbursed himself for the loss.”

Lord Blackburn in *Burnand v. Rodocanachi* (1882), 7 App. Cas. 333, at p. 339, lays it down as a general rule of law that:—

“Where there is a contract of indemnity (it matters not whether it is a marine policy or a policy against fire on land, or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes

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into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back."

It is unnecessary, I think, to cite further authority, but I may be allowed to mention *The Welsh Girl* (1906), 22 Times L.R. 475; *The Commonwealth*, [1907] P. 216 (C.A.); *The Charlotte*, [1908] P. 206; and also the exhaustive summary of decisions on subrogation by Mr. Justice McCardie to be found in *Edwards and Co. Ltd. v. Motor Union Insurance Co. Ltd.* (1922), 38 Times L.R. 690.

The judgment on the appeal should dismiss the Retail Credit Company's appeal against the plaintiff and against the insurance companies on the question of subrogation, all with costs, and should also dismiss the Merchant Casualty Company's appeal against the Retail Credit Company with costs, and the appeals of both insurance companies as against the plaintiff with costs.

MULOCK, C.J.O., and MAGEE and MIDDLETON, JJ.A., agreed with HODGINS, J.A.

GRANT, J.A.:—In this appeal I agree with the views expressed by my brother Hodgins with respect to the principal issues involved in the appeal. He has not dealt with the claim of the plaintiff to interest as against the two insurance companies.

These two claims are based upon policies of insurance entered into by the Merchants Casualty Assurance Company and the Western Assurance Company respectively, and are in the nature of contracts of indemnity. Under the judgment which is the subject of appeal, and which is affirmed by the opinion of Hodgins, J.A., the plaintiff corporation is found to be entitled, as against the two insurance companies under their respective contracts, to certain sums of money, being the amounts of the respective losses sustained by the plaintiff and for which it holds the defendants' contracts of indemnity. The plaintiff now asks for interest upon the amounts for which it has recovered judgment against the two insurance companies respectively. In my opinion, it is entitled to interest thereon, to be computed from the expiration of 60 days from the delivery to the insurance companies of the respective proofs of loss. The period of 60 days is fixed both by the Insurance Act of Ontario and also by the policies in question.

Against this claim for interest it was urged that the plaintiff had not made such a claim in its pleading, and certain decisions of the English Courts were cited as being contrary to the allowance of such claim. As I pointed out in *City of Toronto v. Toronto Railway Co.* (1926), 58 O.L.R. 283 (affirmed on appeal

(1926), 59 O.L.R. 73), sec. 34 of the Ontario Judicature Act is wider in its language than the provisions of Lord Tenterden's Act, which is in force in England. This is very clearly stated in *Toronto Railway Co. v. City of Toronto*, [1906] A.C. 117, at p. 121. It is there laid down by Lord Macnaghten, in delivering the judgment of the Board, that "the result, therefore, seems to be that in all cases where, in the opinion of the Court, the payment of a just debt has been improperly withheld, and it seems to be fair and equitable that the party in default should make compensation by payment of interest, it is incumbent upon the Court to allow interest to such time and at such rate as the Court may think right." Interest had not been claimed in the pleading nor was it allowed at trial nor by the Court of Appeal, but the Judicial Committee upheld the allowance of interest by the Master to whom the matter had been referred to ascertain the amount owing.

This decision has been followed in many cases in our own Courts, and quite recently by the Supreme Court of Canada in *The Custodian v. Blucher*, [1927] S.C.R. 420, at p. 424, in which the claim was in respect of certain dividends payment of which had been withheld and upon which the claimant was held to be entitled to interest; and later still in *Rex v. Carling Export Brewing and Malting Co. Ltd.*, [1930] S.C.R. 361, where interest was allowed upon the amount of sales tax ultimately found to be owing and payment of which had been withheld upon grounds deemed by the Court to be invalid.

In the present case, the claim against the insurance companies is not for damages, but is a claim based upon a contract of indemnity in respect of loss sustained. That it is proper to allow interest on such a claim under an insurance policy, was held by Sutherland, J., at the trial, in *Strong v. Crown Fire Insurance Co.* (1913), 29 O.L.R. 33, at p. 43, where he allowed interest to be computed from the expiration of 60 days from delivery of proofs of loss. Appeal was taken to the then Court of Appeal, by which his judgment was affirmed. It was further affirmed on appeal to the Supreme Court of Canada (*vide* (1913) 48 Can. S.C.R. 577, *sub nom. Anglo-American Fire Insurance Co. v. Hendry*). It is worthy of note that, in so far as the reports disclose, the allowance of interest was not objected to even in the argument, either before the Court of Appeal or before the Supreme Court of Canada, and the judgment of Sutherland, J., was affirmed in both Courts.

No sufficient reason has been presented for depriving the plaintiffs of interest in the present cases. Interest should be allowed, at the legal rate of 5 per cent., as against the Merchants Casualty Company from the expiration of 60 days from the 12th day of

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 as against the Western Assurance Company.

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The other members of the Court agreed with GRANT, J.A., as
 to this.

Appeals dismissed and claim of plaintiffs for interest allowed.

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Municipal Corporations—Remuneration of Aldermen—Municipal Act, R.S.O. 1927, ch. 233, sec. 453—Amendment by 20 Geo. V. ch. 44, sec. 25—Powers of Council—By-law Increasing Allowances—Amount Necessary not Included in Estimates for Current Year—Secs. 221, 306, 307 of Act—Revenue from other Sources—Jurisdiction of Court—Action to Restrain Corporation from Acting upon By-law.

An action for an injunction restraining a municipal council from acting on a by-law passed by it increasing the remuneration of the members of the council does not lie.

By an amendment made in 1930 by 20 Geo. V. ch. 44, sec. 25, to sec. 435 of the Municipal Act, R.S.O. 1927, ch. 233, the words "with the assent of the municipal electors" were struck out, and the part of the section relating to annual allowances to aldermen was made to read, "By-laws may be passed by the councils of cities having a population of not less than 200,000 for paying an annual allowance not exceeding \$1,200 to aldermen." And a by-law was promptly passed by the Council of the City of Toronto authorising the payment of an annual allowance of \$1,200 to the aldermen of the city. In an action brought by a ratepayer to restrain the city corporation from paying the increased allowance, it was conceded that the money necessary to pay this increased allowance was not included in the estimates for 1930:—

Held, that there was not a finality in the first estimates passed by the city council; it was impossible to find as a matter of fact that the contemplated expenditure would not be met by the city's income for the year, it having sources of revenue in addition to the assessment; and there was no reason for interference by the Court with the action of the council, even assuming that the Court had jurisdiction to enter into the question.

Sections 221, 306, and 307 of the Municipal Act considered.

MOTION by the plaintiff for judgment in an action for a declaration that the defendant city corporation is not entitled to pay increased remuneration to the aldermen of the city for 1930, and for an injunction restraining the defendant corporation from paying the aldermen any remuneration for 1930 other than that provided by by-law 3255, that is, any increase beyond that to which

the aldermen were entitled immediately before the passing of by-law 12606 on the 7th April, 1930.

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June 4. By consent of the parties, the motion for judgment was brought on in the Weekly Court, Toronto, and was heard by KELLY, J.

J. M. Bullen, for the plaintiff.

G. R. Geary, K.C., for the defendants.

June 14. KELLY, J.:—An order made on the 5th May, 1930, on the application of the plaintiff, restrained the defendants, their servants, agents and employees, until the action should be heard or otherwise disposed of, from paying to the aldermen of the City of Toronto any increase in salary over the sum of \$500 per annum, pursuant to by-law No. 12606, passed by the council of the defendant corporation on the 7th April, 1930. The order also directed that the trial be expedited, and with that in view made provision for the delivery of pleadings and setting down the action for trial. By consent of the parties, through their counsel, the matter now comes before me by way of motion for judgment for a declaration that the defendant corporation is not entitled to pay this increased remuneration to the aldermen for the year 1930, and for an injunction restraining the defendants from paying the aldermen any remuneration for this year other than that provided by by-law No. 3255 of the defendant corporation, by which I understand is meant any increase beyond that to which the aldermen were entitled immediately preceding the passing of by-law No. 12606.

Section 435 of the Municipal Act, R.S.O. 1927, ch. 233, authorised the passing of by-laws by the councils of cities having a population of not less than 200,000 with the assent of the municipal electors for paying an annual allowance not exceeding \$1,200 to aldermen and an additional allowance not exceeding \$100 to each chairman of a standing committee and to the chairman of the court of revision and the local board of health. By 20 Geo. V. (1930) ch. 44, sec. 25, this section 435 was amended by striking out the words "with the assent of the municipal electors;" so that as amended the part of the section relating to annual allowance to aldermen, as such, now reads: "By-laws may be passed by the councils of cities having a population of not less than 200,000 for paying an annual allowance not exceeding \$1,200 to aldermen."

The material now submitted shews that on the 10th March, 1930, a resolution was passed by the city council requesting an amendment to the Municipal Act to permit the council to increase the salaries of aldermen without the consent of the ratepayers.

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The city council took prompt action on the amended legislation, which came into force on the 3rd April, 1930, for on the 7th April it passed by-law No. 12606, sec. 1 of which is as follows: "An annual allowance of \$1,200 shall be paid to the aldermen of the city in 12 consecutive equal amounts of \$100 to be paid at the end of each calendar month;" and, by sec. 3, by-law No. 3255 and all by-laws amending it were repealed.

On the argument before me the part that the council thus took in promoting the amending legislation—and that so soon after the election of the aldermen, whose remuneration was then \$500 per annum—and the promptness with which the passing of by-law No. 12606 followed upon that legislation, was commented upon as evidencing the council's motive behind it. Though there is reasonable ground for that comment, I am not concerned with the motive; what has devolved upon me is to determine whether what the council did is valid and sufficient, in law, to support the payment of the increased allowance to the present aldermen.

It is conceded that the money necessary to pay this increased allowance was not included in the city's estimates for the current year. What was done—and this is not contradicted—is stated as follows in the defendants' material: "By report number 12 the board of control certified a sum of \$17,850 as a supplementary estimate to the council to provide for the payment of the increases in remuneration to the mayor, board of control, and aldermen from the 7th April, 1930, in accordance with the said by-law 12606 and by by-law 12607," which latter by-law does not affect this action; and this report was adopted by council on the 23rd April, 1930.

From the evidence of the defendant Wilson, the commissioner of finance and treasurer for the defendant corporation, it appears that part of this sum of \$17,850 is required to pay this increased allowance to the aldermen for the period from the 7th April, 1930, to the end of the calendar year. He says he does not know "nor can any other person know before the end of the year whether or not the payment of such increased remuneration to aldermen will cause an overdraft or deficit in the city's net revenue for the year;" and that "at the end of the year all amounts which have been voted throughout the year as supplementary estimates and expended will be offset by the amount by which the revenue received exceeds the revenue estimated and by the amount provided in the estimates and not expended, and only then can it be ascertained whether there are sufficient funds to provide for all supplementary estimates;" and he points out as an explanation, or perhaps intended as a justification, of the course which the council has followed in the past, that, although large amounts have been voted

from time to time as supplementary estimates, the city has in every year for more than the past 10 years had a surplus of revenue over expenditure, which surplus is carried forward as part of the revenue for the ensuing year (the evidence is that in these 10 years the surplus ranged from more than \$250,000 to more than \$1,000,000); but he does not explain, and it is not explained in any other part of the material, what would be the result, if, as is possible, at the end of any year (the present year for instance) it were found that there was not a surplus but a deficit. Surely this would result in non-payment of part of the items or part of some of the items provided for or included in the regular annual estimates, or there would necessarily be a deficit to be carried into the ensuing year. Mr. Wilson makes the important statement that when the board of control report funds or certify funds in any matter, that does not create an overdraft within the usual meaning of that term, *but is merely an expenditure that is not specifically authorised in the estimates*. From this I take it that the practice is to incur debts the payment of which is not actually provided for in any estimate, the board of control in the particular matter merely reporting or certifying funds which are not at the time the subject of or included in or covered by any regular estimate, or which then may not even exist, these debts being intended to be met out of an anticipated surplus at the end of the year which may turn out to be then actually non-existent, and the existence of which Mr. Wilson says no one can know before the end of the year. Practice does not constitute, and is not to be taken as a substitute for, legislation. Mr. Somers, the city clerk, following the statement in his evidence that the increased salaries of the aldermen had not been provided for in the 1930 estimates, said that there is hardly a meeting of the council that there is not a special appropriation passed by council, and that creates an overdraft. Mr. Wilson takes exception to the use of the word "overdraft." It is quite clear, however, that if a debt be incurred provision for the payment of which is not included in the estimates for the year, such debt or additional payment must be regarded as an overdraft *quoad* the regular estimates for that year.

Municipal councils derive their authority wholly under the Municipal Act. The Act gives them certain specific power; and, while they are supreme in all matters within their jurisdiction, they cannot assume to themselves powers not given them by the Act; and the method by which they exercise the powers so conferred upon them must be in accordance with what the Act directs or implies.

The Act makes provision for councils preparing annual esti-

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mates and assessing and levying what is necessary to pay the debts of the corporation. By sec. 306(1), the council of every municipality shall in each year assess and levy on the whole ratable property within the municipality, a sum sufficient to pay all debts of the corporation, whether of principal or interest, falling due within the year (but not more than the maximum rate therein mentioned). This contemplates raising by levy in any year sufficient to pay all the debts of the corporation falling due within that year. Section 307(1) provides that the council shall in each year prepare estimates of all sums required for the purposes of the municipality during such year, making due allowance for the cost of collection, and for the abatement of taxes and for taxes which may not be collected; and (subsec. 2) one by-law or several by-laws for assessing and levying the rates may be passed as the council may deem expedient. This contemplates a further levy in a proper case. Section 308(1) provides for a case where the amount collected falls short of the sum required—that is the sum required as shewn by the estimates—and says the council may direct that the deficiency be made up from any unappropriated fund, or, if there is no such fund, the deficiency may be deducted proportionately from the sums estimated, or from any one or more of them. It will be seen that this refers to a falling short in collections of the amount required as shewn by the estimates and not to other sums or debts not included in or provided by the regular estimates.

Though the plaintiff's counsel urged many reasons in support of his application, special reference must be made to sec. 297, subsec. 1, of the Act, which declares: "Except where otherwise provided by this or any other Act, a corporation shall not incur any debt the payment of which is not provided for in the estimates for the current year, unless a by-law of the council authorising it has been passed with the assent of the electors." This subsection is in the exact language of sec. 289, subsec. 1, of the Municipal Act, R.S.O. 1914, ch. 192, which was under consideration in *Waterous Engine Co. v. Town of Capreol* (1922), 52 O.L.R. 247, in the reasons for judgment in which Magee, J.A., said (p. 252) that it forbids incurring a debt not provided for in the estimates for that year.

In the same case (at p. 259), Meredith, C.J.O., said in reference to the non-observance of formalities or methods prescribed by the statute (in that case the failure to pass a by-law), that the incurring of the debt was in direct contravention of sec. 289(1).

In my opinion what is prescribed by sec. 297(1) of the present

Act is imperative, and not merely directory, as urged by the defendants' counsel. I agree with the statement made by Ferguson, J.A., at p. 258, in the *Waterous* case, *supra*, that where the grantor of the capacity and power to do something imposes terms and conditions on how that power shall be exercised, those powers and conditions must be observed or the power has not been effectively exercised. This is particularly so in a case such as the present, where the members of the council, who stand as trustees for the ratepayers, have a personal and pecuniary interest in doing that which the Legislature has empowered them to do, their personal interest being thus in conflict with the duties pertaining to their office. In such circumstances there should be strict compliance with the terms and requirements of the Act. Moreover, whatever may have been the view of it taken by the aldermen, I cannot see, and I am not prepared to admit, that increasing their annual allowance at the time by-law number 12606 was passed, and thus incurring a substantial debt, was a matter of either urgency, emergency, or necessity, calling for extraordinary action or such as might reasonably suggest an argument in favour of a departure from strict observance of these requirements.

It, therefore, comes down to this, that, though sec. 435 as amended gives power to this council to pass by-laws for paying an annual allowance not exceeding \$1,200 to the aldermen, the terms and conditions by which that power must be exercised were not observed, and the power has not been effectively exercised; and in consequence the defendants are not entitled to pay this increased remuneration to the aldermen for the year 1930, and should be restrained from doing so. Entertaining this opinion, it is unnecessary for me to consider or discuss the several other grounds urged on behalf of the plaintiff in support of his claim.

There will be judgment as above indicated with costs to the plaintiff payable by the defendant corporation.

The defendants appealed from the judgment of KELLY, J.

June 23. The appeal was heard by MULLOCK, C.J.O., MAGEE, MIDDLETON, FISHER, and GRANT, JJ.A.

Geary, K.C., for the appellants.

Bullen, for the plaintiff, respondent.

June 24. The judgment of the Court was read by MIDDLETON, J.A.:—An appeal by the defendant corporation from the judgment of Mr. Justice Kelly declaring that the defendant corporation is not entitled to pay any increase in remuneration over and above the sum of \$500 to any alderman of the City of Toronto for the year

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1930, as provided for in by-law 12606 of the defendant corporation, and restraining it from making the payments contemplated.

We do not need to recapitulate the facts, for they are fully and accurately set out in the judgment of the learned Judge in review.

After careful consideration, we find ourselves unable to agree with the conclusion arrived at. In the first place, there is no precedent, so far as we are aware—certainly none was cited to us by counsel—for the bringing of an action for an injunction restraining a municipal council from acting upon a by-law such as that in question here. The only cases which have been referred to are cases in which a creditor, basing an action upon a contract made by the municipality disregarding the provisions of the Municipal Act, or contravening some of its provisions, met defeat in an action brought by him.

We, however, think it desirable to point out wherein we differ from our learned brother.

The relevant sections of the Municipal Act, R.S.O. 1927, ch. 233, are secs. 221, 297, and 306 to 309.

Under sec. 306 the council is required to assess and levy a sum sufficient to pay all the debts of the corporation, whether of principal or interest, falling due within the year, and a limit is placed upon the assessment for that purpose. This sum is quite distinct from the rate necessary for the payment of "the current annual expenditure of the corporation," which is referred to in sec. 306(2).

By sec. 307 the council is required to prepare estimates of the amount required for the purposes of the municipality during the year. This covers necessarily the debts falling due within the year, as well as the annual expenditure of the corporation, and provision then follows looking to the contingencies incident to collection. The amount assessed may not all be collectible—if the amount collected falls short, the council may make up the deficiency from any unappropriated fund or may deduct it from the various sums estimated, while if the amount collected exceeds the estimates, the surplus is to be at the disposal of the council unless otherwise expressly appropriated. This indicates the directory nature of the statutory provisions. There is an element of elasticity in them, for exact certainty is unattainable.

In cities where there is a board of control, sec. 221 governs, and it casts upon the board the duty of preparing estimates of the proposed expenditure for the year, and certifying these estimates to the council for consideration. It also contains a very important provision, found in subsec. 2, that the council shall not appropriate or expend any sum not provided for by the estimates "or by a special or supplementary estimate certified by the board to

the council, without a two-thirds vote of the council authorising such appropriation or expenditure."

This indicates that there is not a finality in the first estimates passed by the municipality, and this is emphasised by the provision of sec. 307(2), that "one by-law or several by-laws for assessing and levying the rates may be passed as the council may deem expedient."

Turning now to the matter in hand, the municipal corporation is called upon to provide for and expend a very large sum of money annually, amounting to approximately \$30,000,000. The bulk of this is derived from the assessment, but the city has other sources of revenue. In addition to this, it is shewn that in each year, for the last 10 years at least, the actual revenue received exceeded that estimated by a very large sum. In 1929 this amounted in round figures to \$1,550,000. The supplemental estimates passed by the board of control and council amounted to \$550,000, leaving a net surplus of over \$900,000 handed over from 1929, and credited upon the estimates for 1930. This is not an unusual occurrence, as in one year, 1922, the surplus handed over to the ensuing year was over \$1,500,000.

The municipal officials expect some similar surplus to be available as a result of the financial operations for 1930, and, having this in view, the supplemental estimates have been approved and passed, not merely by the board of control but by the city council, no direction for the issue of the supplementary levy being made because it is expected that ample money will be on hand to meet the demands made.

The amount here involved is comparatively trivial—some \$17,000, and there is no ground for supposing that the treasury will not be in funds to meet this at the end of the year, without any supplemental levy, and, if there is a deficit, the municipal council will no doubt see to it that some satisfactory arrangement is made. The responsibility rests upon the council.

Under these circumstances, it is impossible to find as a matter of fact that the contemplated expenditure will not be met by the income for the year, and therefore I can see no reason for interference by the Court with the action of the municipal council, even assuming that this Court has jurisdiction to enter into the question.

Several minor grounds of attack were mentioned, which were adequately dealt with upon the argument of the motion. Even if these or any of them should turn out to be well-founded, they would not, I think, justify the Court in granting the injunction sought.

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The appeal in my view succeeds, and the action should be dismissed with costs here and below.

Appeal allowed.

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VILLAGE OF PORT DALHOUSIE v. COUNTY OF LINCOLN.

June 24.

Municipal Corporations—County Highways—By-law of County—Highway Improvement Act, sec. 28, subsecs. 2 (c) (20 Geo. V. ch. 10, sec. 5), 5, 6—Roads in Village—Suburban Highways—Payments by Village to County—Rebates.

Under the provisions of the Highway Improvement Act, R.S.O. 1914, ch. 40, and amendments, the County Council of Lincoln in 1917 passed a by-law establishing a system of county highways and designating as part of the system certain streets in the village of Port Dalhousie. The by-law also provided that funds for the construction, improvement, and maintenance of these highways should be raised by annual levy or by the issue of debentures; and debentures were issued by the county corporation to meet the cost of construction and maintenance of these county roads, as well as of certain suburban roads. Under by-laws passed in 1926, 1927, and 1928, the county council levied rates on all the ratable property in the county to raise the interest and sinking fund to meet the debentures to be issued in respect of the county roads and a further sum in respect of the county's share of the construction of suburban roads. The amounts levied against the village under these by-laws were duly paid to the county treasurer; and the village corporation brought this action against the county corporation, claiming a refund or rebate of 75 per cent. of the amount so paid, relying on the provisions of the Highway Improvement Act, R.S.O. 1927, ch. 54. The defendant corporation repaid to the plaintiff corporation certain moneys in respect of the levies made in 1926, 1927, and 1928, but refused to pay any proportion of the rates raised for interest or sinking fund or in respect of the debentures issued for the construction and maintenance of county roads before 1926, or to rebate any sum in respect of suburban roads:—

Held, that the provisions of subsec. 6 of sec. 28 of the Highway Improvement Act, R.S.O. 1927, ch. 54, are a complete answer to the plaintiff corporation's claim so far as it relates to county highways. For practical purposes suburban roads retain their character as county roads; and, as they are not expressly excluded from the operation of subsec. 5 of sec. 28, the rebate therein mentioned includes a rebate of the rate levied for suburban as well as county roads.

Subsection 5, first enacted by the Highway Improvement Act of 1926, was intended to give relief to villages and towns in a county where a system of county roads had been adopted.

Subsection 2 (c), enacted by 20 Geo. V. ch. 10, sec. 5, is applicable only to the rebate payable in 1930 and thereafter, and it merely declares the law for the future, and does not affect the construction to be placed upon subsec. 5 in this action.

Ormond Investment Co. Ltd. v. Betts, [1927] 2 K.B. 326, [1928] A.C. 143, referred to.

The only relief to which the plaintiff corporation is entitled is in respect of the moneys levied by it and remitted to the county corporation to pay its shares of debentures issued in respect of suburban roads after the Act of 1926, 16 Geo. V. ch. 15, came into force. A reference was directed to ascertain what, if any, moneys were due in respect thereof.

In this action the plaintiff municipality sought to recover from the defendant municipality certain moneys to which it claimed to be entitled by virtue of the provisions of the Highway Improvement Act, 1926, 16 Geo. V. ch. 15, the Highway Improvement Act, R.S.O. 1927, ch. 54, and amendments.

The action was tried before WRIGHT, J., without a jury, at St. Catharines.

A. Courtney Kingstone, K.C., for the plaintiff municipality.

G. Lynch-Staunton, K.C., and *A. W. Marquis*, K.C., for the defendant municipality.

June 24. WRIGHT, J.:—In 1917 the County Council of the County of Lincoln passed a by-law numbered 600 under the provisions of the Highway Improvement Act, being R.S.O. 1914, ch. 40, and amendments thereto, whereby a system of county highways was established and certain highways were designated as forming part of the said system, among others certain streets in the village of Port Dalhousie, the plaintiff municipality.

By clause 5 of that by-law it was provided that funds for the construction, improvement, and maintenance of such highways be raised by annual levy or by the issue of debentures from time to time or by other means authorised by the Municipal Act.

Subsequently debentures were issued by the County of Lincoln to meet the cost of construction and maintenance of such county roads, as well as of certain suburban roads, to which reference will be made later.

Under by-law number 807, passed on the 15th June, 1926, the County Council of the County of Lincoln levied a rate on all the ratable property in the County of Lincoln to raise the interest and sinking fund to meet the debentures authorised to be issued for the construction of the county roads, and a further sum to be raised in order to pay the interest and sinking fund in respect of debentures authorised to be issued for the county's share of the construction of suburban roads.

By-laws Nos. 846 and 847, for a like or similar purpose, were passed in 1927 and 1928 respectively by the same county council.

The amounts levied against the plaintiff municipality under these by-laws were duly paid over to the county treasurer, and the plaintiff municipality now claims a refund or rebate of 75 per

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cent. of the amounts so paid, relying on the provisions of sec. 28 of the Highway Improvement Act, R.S.O. 1927, ch. 54.

It is admitted that the defendant repaid to the plaintiff certain moneys in respect of the levies made in 1926, 1927, and 1928, but refused to pay any proportion of the rates raised for the purpose of paying the interest or sinking fund on or in respect of the debentures issued for the construction and maintenance of county roads prior to 1926, or to rebate any sum whatever in respect of suburban roads.

Certain admissions in writing were put in at the trial, of which those material are as follows, viz.:—

(1) That the road through Port Dalhousie is part of the county road system and is not an extension or connecting link within the meaning of clause (b) of subsec. 5 of sec. 28 of the Highway Improvement Act, R.S.O. 1927, ch. 54.

(2) That an agreement dated the 30th January, 1923, between the parties, had been performed by the payment by the defendant to the plaintiff of \$3,296 in full satisfaction of all claims under that agreement.

(3) That the defendant in 1926, 1927, 1928, and 1929 made a general levy for maintenance of roads included in the county road system and for sinking fund and interest on debentures issued to raise money for construction and improvement of the said roads and for construction and improvement of roads embraced under the name of suburban roads.

(4) That no levy has been made for sinking fund or interest on debentures which may have been issued since 1925 excepting for suburban roads.

As a defence to the claims of the plaintiff, the defendant contends:—

(1) That the provisions of subsec. 5 of sec. 28 of the Highway Improvement Act do not apply to that portion of the annual rate levied to pay interest or sinking fund in respect of debentures issued to pay for construction of county roads prior to the passing of the Highway Improvement Act, 1926—in other words, that the last named Act has no retroactive effect, and that the basis upon which the rebate is calculated should not include anything expended before the passing of the Act of 1926 but only amounts expended thereafter.

(2) That suburban roads are not covered or affected by the provisions of subsec. 5 of sec. 28, and are not to be deemed county roads for the purposes of that section.

(3) That the agreement of the 30th January, 1923, consti-

tutes such an agreement as, by virtue of subsec. 7 of sec. 28, renders inapplicable the provisions of subsec. 5 of sec. 28.

There is a perfect maze of legislation in respect of county roads, but I do not consider it necessary to tread through all that maze in order to discover the intention of the Legislature as to the meaning of subsec. 5.

This subsection was first enacted by the Act of 1926, already referred to, and manifestly was intended to give relief to villages and towns in a county where a system of county roads was adopted.

In view of the decision in *Village of Merritton v. County of Lincoln* (1917), 41 O.L.R. 6, it would appear that the first part of subsec. 5 was superfluous legislation, unless for the purpose of declaring, in accordance with the decision, what the law was.

Subsection 5 declares that urban municipalities shall be subject to the annual general levy for county road purposes under the by-law mentioned in sec. 12. By reference to sec. 12 it will be seen that this contemplates a general by-law such as by-law 600 of the defendant municipality, but does not specify the manner in which the money is to be raised in the first instance. Section 14 points out the manner in which the money may be provided, and these two sections ought to be read together, the latter as complementary of the former. Thus read, the difficulty suggested by the counsel for the defendant disappears.

When secs. 12 and 14 are read together, then do the provisions of subsec. 5 of sec. 28 apply to the facts in the present case?

The annual general levy is for county road purposes whether for present or future construction, or to pay for past construction in the form of debentures, or otherwise.

The only case cited or which I have been able to find at all helpful on the point is *Foster v. Village of Hintonburg* (1897), 28 O.R. 221. In that case the late Mr. Justice MacMahon held that the term or expression "school rate" included not only moneys required for current purposes, but also the annual amount required to meet debenture debt maturing each year. Obviously the debentures had been issued to provide funds for past expenditure.

By-laws numbers 807, 824, 846, and 887 state specifically that certain of the moneys authorised to be levied thereunder are to pay the interest and sinking fund authorised to be issued for the construction of county and suburban roads, and thus earmark the moneys for such purposes.

In my opinion, support is lent to this view by the concluding part of subsec. 5, which provides that the cost of repairs (if any) done by the county upon any such county road extension or connecting link, or upon any road in such urban municipality in-

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This repair-work would generally, if not always, be performed on county roads in the urban municipality constructed prior to the year specified. Thus the statute deals with expenditure on roads constructed before it was enacted, and if so it may well be contended that it deals also with the debenture rate in respect of such roads.

Clause (b) of subsec. 5 also appears to lend support to this view. While it deals with an extension or connecting link mentioned in subsec. 1, yet it provides for the rebate in years subsequent to the construction, by excluding the year during which construction or rebuilding takes place, thereby indicating the intention of the Legislature to allow rebates after construction has been completed.

Thus far the provisions of the statute favour the plaintiff's contention; and, but for the provisions of subsec. 6 of sec. 29 of the Highway Improvement Act, 1926, now sec. 28 of R.S.O. 1927, ch. 54, I should hold the plaintiff entitled to succeed on that branch of the case.

In my view, however, the provisions of the last cited subsection raise an insuperable obstacle to the plaintiff's claim so far as it relates to county highways.

This subsection provides that the amount so repaid by the county shall be deemed to form part of the expenditure in carrying out a plan of highway improvement for the purpose of ascertaining the amount of aid which the county should receive from the Province. Section 17 of the Revised Act requires that the county council shall annually or oftener submit a statement shewing the expenditures, including payments made to towns and villages—and that the Minister may direct the payment to the county of a percentage of such expenditures.

This contemplates the payment upon construction of a share of the cost by the Province, and it would seem unreasonable that the county should be entitled to receive from the Province a proportion of the original cost, and also a proportion of the annual levy to meet the debentures issued for the purpose of paying the balance of the original cost—in other words, the Government would be required to make a second grant.

This would be the effect if the County of Lincoln is entitled to include in its claim from the Province a rebate granted by it to the plaintiff municipality in respect of the rate levied to meet the maturing debentures issued to defray the original cost. This would seem an unreasonable result, and, if possible, to be avoided.

If the contentions of the plaintiff were given effect to, it would change the financial scheme or arrangement under which the highways were constructed and give the legislation a retroactive effect as to the rights of the respective municipalities. Such a construction should not be given effect to, unless it cannot be avoided without doing violence to the language of the enactment. See Craies on Statute Law, 3rd ed., p. 326, and cases there cited. Here it is possible to construe the provisions of the Act without giving it a retrospective effect.

The argument advanced by counsel for the defendant, that subsec. 7 concludes the matter, does not appeal to me as sound.

It provides for the case where the urban municipality receives from the county under an agreement special grants for the purpose of road improvements. The agreement referred to is that provided for in sec. 5 of the Highway Improvement Act, R.S.O. 1914, ch. 40, sec. 9 of the Highway Improvement Act, 1920, sec. 27 of the Highway Improvement Act, 1926, or sec. 26 of the Highway Improvement Act, R.S.O. 1927, ch. 54, and does not include such an agreement as that entered into between the parties to this action, dated the 30th January, 1923, and filed as an exhibit at the trial. This last mentioned agreement stipulated that for the use of certain sanitary and storm sewers constructed by the plaintiff municipality the defendant should pay a yearly sum towards defraying the cost—in effect a rental for the use of such sewers, and not for the purposes of road improvement as contemplated by the statute.

Turning now to a consideration of the contention that moneys levied by the county to pay debentures issued in respect of suburban roads are not within the purview of subsec. 5, it will be observed that under the several enactments relating to suburban roads these have been treated as county roads. See the Ontario Highways Act, 1915, ch. 17, sec. 12 *et seq.*, which is the genesis of this class of road, also the Highway Improvement Act, 1926, ch. 15, secs. 36 to 40, and the Highway Improvement Act, R.S.O. 1927, ch. 54.

Under these enactments, suburban roads are selected from roads forming part of the county road system, and continue to be under the jurisdiction and control of the county council. The only important change in respect of these roads is that the commission appointed for that purpose shall have the direction of the work done thereon. The county is not relieved from paying the debt created by the debentures issued to defray the cost of construction, and is entitled to include the sums expended for maintenance and construction in the statement of expenditures fur-

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Thus to all practical intents and purposes suburban roads retain their character as county roads; and, as they are not expressly excluded from the operation of subsec. 5 of sec. 28, it must be held that the rebate mentioned in that section includes a rebate of the rate levied for suburban roads as well as for county roads.

The doubt involved in the construction of subsec. 5 of sec. 28 has been removed as to future rebates by an Act passed by the Legislature at its recent session. See the Highway Improvement Act, 1930, ch. 10, sec. 5, amending sec. 28 of the principal Act by adding subsec. 2(c), which reads as follows:—

“(c) In determining the amount of such rebate payable in the year 1931 and thereafter, the amount raised by the corporation of a town or village for the purpose of paying off its share of any debenture debt of the county shall not be considered.”

For the plaintiff it is contended that this enactment shews an intention of the Legislature to change the law, and therefore it ought to be presumed that prior to its enactment the law was otherwise; and, applying such reasoning to the present case, the law formerly was that payments in respect of debenture debts should be included.

For the defendant it was contended that this enactment was merely to clarify the law and ought not to be presumed to change it.

The authorities cited on this branch of the argument were: *Attorney-General v. Clarkson*, [1900] 1 Q.B. 156; *Cape Brandy Syndicate v. Inland Revenue Commissioners*, [1921] 2 K.B. 403; *Ormond Investment Co. Ltd. v. Betts*, [1927] 2 K.B. 326.

The decision in this last cited case was reversed in the House of Lords (see [1928] A.C. 143), and the review and analysis of the previous decisions by Lord Buckmaster is very instructive. From this decision I deduce the principle applicable to be, that where a statute is ambiguous and equally open to two different constructions, if the legislative body enacts other legislation based on the assumption that one of the constructions is the correct one, then such construction shall be deemed to be the proper construction.

It is not clear how this principle can be applied here. The amendment of 1930 does not assume that one of the two constructions of the previous Act is correct, nor is such amendment based on such construction. It merely declares the law for the future.

In the result I hold that the only relief to which the plaintiff is entitled is in respect of the moneys levied by it and remitted

to the county to pay its share of debentures issued in respect of suburban roads after the Act of 1926 came into force; and, to ascertain what, if any, moneys are due in respect thereof, there will be a reference to the Local Master at St. Catharines if the parties cannot agree upon the amount.

Success being fairly evenly divided, there will be no costs of action to judgment; costs of the reference reserved until the Master has made his report.

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[APPELLATE DIVISION.]

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June 25.

Constitutional Law—Federal District Commission Act, 1927, 17 Geo. V. ch. 55 (D.)—Intra Vires—Property Acquired by Crown—By-laws of Commission—Prohibition of Certain Traffic upon Driveway—Delegation of Powers to Commission—British North America Act, secs. 91, 92—Case Stated by Magistrate—Appeal from Magistrate's Order—Forum—Criminal Code, secs. 761, 766—Powers of Commission—Imposition of Penalties.

The Federal District Commission Act, 1927, 17 Geo. V. ch. 55, is within the powers of the Parliament of Canada; and the Commission's by-law No. 16, forbidding the operation upon the Commission's driveway of any vehicle for the transportation of passengers for hire, its by-law No. 14 providing a penalty for non-compliance, and its agreement giving the Ottawa Electric Railway Company the exclusive right to operate sight-seeing busses for hire on the driveway, are within the powers of the Commission.

A police magistrate, having dismissed a complaint against the defendant company for unlawfully operating upon the driveway a sight-seeing bus, stated a case for the opinion of the Court, upon which it was *held*, that there should have been a conviction for the offence charged.

Per RIDDELL and FISHER, JJ.A.:—The "local works and undertakings" which are "declared by the Parliament of Canada to be for the general advantage of Canada" are expressly excepted in the enumeration in sec. 92 of subjects assigned to the Legislatures of the Provinces; and, consequently, must fall to the Dominion under sec. 91 (29). The same result follows from the provision, earlier in sec. 91, for the exclusive jurisdiction of the Dominion "in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

Per MIDDLETON, J.A.:—The law of property and civil rights assigned to the Province refers to that branch of the law as between subject and subject, and has no application to the Crown.

MASTEN, J.A., questioned whether the Court has jurisdiction under sec. 761 of the Criminal Code to entertain an appeal upon the case stated; but, as the appeal was argued without objection and without reference to certain difficulties indicated, he did not dissent from the conclusion of the majority, reserving his opinions on the constitutional questions discussed.

Per ORDE, J.A.:—By sec. 766 of the Code, the authority and jurisdiction of the Court to which a case is stated may be exercised by a

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Judge of that Court sitting in Chambers—the stated case here ought to have gone to a single Judge of the High Court Division in Chambers.

The legislation is fully justified under the general power “to make laws for the peace, order, and good government of Canada.”

Subsection 2 of sec. 4 of the Federal District Commission Act, conferring power upon the Commission to impose penalties for the infraction of its by-laws, is not *ultra vires*.

AN appeal by Ernest Ackland, the private prosecutor, upon a case stated pursuant to sec. 761 of the Criminal Code, from an order dated the 23rd August, 1929, made by the Police Magistrate for the County of Carleton dismissing the complaint of the appellant, which was to the effect that the defendant company unlawfully operated, upon the driveways or other property of the Federal District Commission, a sight-seeing bus, contrary to a by-law of the Commission passed pursuant to a statute of the Dominion of Canada.

March 12 and 13. The appeal was heard by RIDDELL, MASTEN, MIDDLETON, ORDE, and FISHER, JJ.A.

Redmond Quain, for the appellant. Whether or not the driveways are highways within the meaning of the Highway Traffic Act is immaterial for the purpose of this case. The Highway Traffic Act gives no rights, but simply restricts rights which the public may have at common law. Such rights as the public have at common law do not apply to property privately owned by a Commission incorporated by a Dominion statute and declared to be a work for the general advantage of Canada. The declaration is conclusive, and overrides all other considerations. The driveways being upon the property of the Commission, it may make such rules as it wishes in regard to them, including that of allowing one company to use them and denying that privilege to all others. Parliament had jurisdiction to delegate to the Commission the powers which it gave it: *Township of Sandwich East v. Union Natural Gas Co.* (1924-5), 56 O.L.R. 399, 57 O.L.R. 656. The objects of the Commission are not purely provincial, and the Dominion has authority to create such a body and to vest it with the powers exercised in this matter. The Commission is a trustee for the Crown in the right of the Dominion. The Commission is simply a means or channel through which the Government of the Dominion carries out certain projects. The driveways are “public property” within the meaning of sec. 91(1) of the British North America Act, as distinguished from things for private use. The works of the Commission are not local in any such sense as would exclude them from Dominion jurisdiction. The by-law and statute are *intra vires* of the Commission and of the Dominion Par-

liament respectively. As to the effect of a declaration under head 10(c) of sec. 92 of the British North America Act, counsel referred to *Rex v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434, at p. 447; *City of Montreal v. Montreal Street Railway Co.*, [1912] A.C. 333, at p. 340; *Union Colliery Co. of British Columbia Ltd. v. Bryden*, [1899] A.C. 580; *La Compagnie Hydraulique de St. François v. Continental Heat and Light Co.*, [1909] A.C. 194; *Dowsett v. Edmunds*, [1926] 4 D.L.R. 796, at p. 798; *Attorney-General for Ontario v. Attorney-General for the Dominion*, [1896] A.C. 348; *Rex v. Sheridan*, [1924] 3 D.L.R. 339; *McColl v. Canadian Pacific Railway Co.*, [1923] A.C. 126, at p. 135; *Gauthier v. The King* (1918), 56 Can. S.C.R. 176, at p. 194; *Toronto Corporation v. Bell Telephone Co. of Canada*, [1905] A.C. 52; *Reference re Waters and Water-Powers*, [1929] S.C.R. 200, at pp. 213, 216; *Luscar Collieries Ltd. v. Macdonald*, [1927] A.C. 925, at p. 933; *Toronto and Niagara Power Co. v. North Toronto Corporation*, [1912] A.C. 834, at p. 839. As to discrimination by a public body, see *Perth General Station Committee v. Ross*, [1897] A.C. 479. As to emanations from the Crown, see *Howarth v. Electric Steel and Metals Co. Ltd.* (1916), 35 O.L.R. 596; *Coleman v. The King* (1918), 44 D.L.R. 675.

W. N. Tilley, K.C., for the defendant company, respondent. The Federal District Commission Act, 1927, 17 Geo. V. ch. 55, is *ultra vires* of the Parliament of Canada, because it has no relation to any of the matters specifically enumerated in sec. 91 of the British North America Act, and its validity, if any, must rest upon one or other of the exceptions to head 10 of sec. 92 of the Act. But the subject-matter of the Federal District Commission Act is not a work within the meaning of head 10 of sec. 92, and so the Parliament of Canada had no power to declare that the Commission's works were works for the general advantage of Canada. If the Act is not wholly *ultra vires*, the provisions of subsec. 2 of sec. 4, empowering the Commission to impose penalties for the infraction of its by-laws, are *ultra vires*: *In re Board of Commerce Act, 1919, and Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191, at p. 199. The by-law in question, No. 16, is not within the terms of the Act, and is therefore invalid. It is bad because it is discriminatory.

Edward Bayly, K.C., for the Attorney-General for Ontario. The Dominion has no right to create corporations with the power to hold land: *John Deere Plow Co. v. Wharton*, [1915] A.C. 330. These driveways, having been thrown open to the public, became highways, and subject to the Provincial Highway Traffic Act, R.S.O. 1927, ch. 251, sec. 1(f): and the Dominion cannot make

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a law, for example, that persons shall turn to the left, because such a matter is one which the Province, under the head of civil rights and municipal institutions, alone has power over: *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437, 441.

D. L. McCarthy, K.C., for the Attorney-General for Canada. The Commissioners are merely agents of the Crown to carry out the scheme of beautifying the Federal District of Ottawa and vicinity. So these driveways are the property of the Crown and are not subject to the legislative jurisdiction of the Provincial Legislature, and come within head 1 of sec. 91 of the British North America Act. These driveways being the property of the Crown, it is within the power of Parliament to say that any one who is guilty of an infraction of any laws made in regard to them should be punished. Parliament has the right to delegate its powers to the Commission: *Hodge v. The Queen* (1883), 9 App. Cas. 117. Reference also to *Burrard Power Co. Ltd. v. The King*, [1911] A.C. 87, at pp. 94, 95; *City of Montreal v. Montreal Street Railway*, [1912] A.C. 333; *McGregor v. Esquimalt and Nanaimo Railway Co.*, [1907] A.C. 462.

Tilley, K.C., in reply. These driveways are not Crown property in the sense of head 1 of sec. 91 of the British North America Act at all. They are not property held by the Crown, and therefore the Crown has no legislative jurisdiction over them, unless by some other clause. These driveways, having been accepted and used by the public, have become highways, and the Dominion has no jurisdiction over highways. A highway is not a "work."

Quain, in reply. The driveways are local work for the purposes of the declaration referred to in head 10(c) of sec. 92 of the Act; but, if they are not local work, then automatically they are within sec. 91, and consequently within the jurisdiction of the Dominion. The driveways are not highways, though there has been a limited dedication of certain rights or licences to the public in respect of them.

June 25. RIDDELL, J.A.:—This is a case of considerable importance and corresponding difficulty, involving a determination of the powers of the Dominion of Canada under the British North America Act, 1867. It would seem necessary to set out the facts somewhat more fully than usual.

In 1899, by the Act 62 & 63 Vict. ch. 10 (Dom.), the Parliament of Canada purported to incorporate a body to be known as "The Ottawa Improvement Commission," with "power to make such by-laws, employ such persons, and pay and defray such ex-

penses as are necessary to enable them to carry into effect the purposes for which they are constituted, or any of the powers conferred on them by" the Act—no such by-law to be effective "until approved by the Governor in Council. . . ." The Commission had, *inter alia*, given to them the powers to—

"(a) purchase, acquire and hold real property in the city of Ottawa, or in the vicinity thereof, for the purpose of public parks or squares, streets, avenues, drives or thoroughfares;

"(b) do, perform and execute all necessary or proper acts or things for the purpose of preparing, building, improving, repairing and maintaining all or any of such works for public use."

By sec. 8, "All works or undertakings of the Commission under clauses (a) and (b) . . . are hereby declared to be for the general advantage of Canada."

The object of the incorporation of this body was, of course, the beautifying and improvement of the neighbourhood of the Capital of Canada, where the Parliament met from time to time and where the Executive was placed.

In 1919, the scheme received some modification by the Ottawa Improvement Commission Act, 1919, 9 & 10 Geo. V. ch. 62 (Dom.); this somewhat extended the works or undertakings declared to be for the general advantage of Canada; but we may pass it over and look at the present Act (1927), 17 Geo. V. ch. 55 (Dom.) By this Act (sec. 4(1)), a body corporate is created called "the Federal District Commission," with power "to make such by-laws, employ such persons, and pay and defray such expenses as are necessary to enable it to carry into effect the purposes for which it is constituted . . . no by-laws so made" to "come into force or effect until approved by the Governor in Council."

Section 4(2) reads:—

"(2) Any by-law of the Commission may impose penalties not exceeding fifty dollars, recoverable upon summary conviction, for the infraction of its provisions, and may provide for the imprisonment of offenders in default of payment of such penalties for any term not exceeding two months."

Section 7 provides as follows:—

"7. The Commission may,—

"(a) purchase, acquire and hold real property within such area or district as may from time to time be designated by the Governor in Council for the purposes of public parks or squares, streets, avenues, drives, thoroughfares or bridges;

"(b) do, perform and execute all necessary or proper acts or things for the purposes of preparing, building, improving, repairing, maintaining and protecting all or any of the works of or

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under the control of the Commission, and for preserving order thereon;
“(c) co-operate with any local municipality in the improvement and beautifying of the same or the vicinity thereof by the acquisition, maintenance and improvement of public parks, squares, streets, avenues, drives, thoroughfares or bridges in such municipality or in the vicinity thereof;

“(d) grant concessions for the maintenance of places of refreshment, amusement or shelter, or for the encouragement of sports and games, upon any property under its administration or control, where in the judgment of the Commission it is advisable in the public interest to do so.”

Section 12 is as follows:—

“12. All works or undertakings of the Commission are hereby declared to be works for the general advantage of Canada.”

By sec. 20, the assets, etc., of the original corporation, the Ottawa Improvement Commission, were vested in the new corporation.

The Ottawa Improvement Commission acquired certain lands for its purposes, and, beginning in 1922, constructed a driveway thereon—this driveway runs “from Richmond-road in the township of Nepean, in the Province of Ontario, by means of a road-way to the shore of the Ottawa river at a point where a bridge crossing the Ottawa river and erected and owned by the Federal District Commission runs to and across the inter-provincial boundary in the Ottawa river into the Province of Quebec.”

This driveway is wholly upon the lands acquired by the Ottawa Improvement Commission—upon it is considerable vehicle traffic, amounting to from 700 to 800 motor-cars in an hour on some occasions.

At a meeting of the Federal District Commission, on the 15th June, 1929, a by-law was passed in the following terms:—

“BY-LAW No. 16.

“Be it enacted as a by-law of the Federal District Commission:—

“1. That no person, firm or corporation shall operate or cause or permit to be operated upon the Commission’s driveways or other property, or any part thereof, a vehicle for the transportation of passengers for hire.

“2. That no person, firm or corporation shall operate upon the Commission’s property any vehicle which the Commission shall in its absolute discretion deem to be a vehicle operated in competition with any person, firm or corporation to which the Commission has granted exclusive rights.

"3. That any person, firm or corporation may lay any information or complaint relating to any infraction of this by-law, and sec. 14 of by-law No. 14 of this Commission shall apply to this by-law and shall be deemed to be part thereof."

This was approved by the Governor in Council, as was the by-law No. 14, sec. 14 of by-law 14, referred to in this by-law No. 16, is as follows:—

"14. Any person or persons who shall be guilty of any infractions or breach of this by-law or of non-compliance with any of the requirements thereof shall, upon summary conviction thereof before the Police Magistrate, Mayor, or other Justice or Justices of the Peace having jurisdiction in the matter, forfeit and pay such fine as the said Police Magistrate, Mayor, Justice or Justices of the Peace convicting shall inflict of not less than one dollar and not more than fifty dollars, together with the costs of the prosecution, and in default of payment thereof such offender shall be sentenced to imprisonment in the common gaol of the County of Carleton, with or without hard labour, in the discretion of the Police Magistrate, Mayor, Justice or Justices of the Peace so convicting, not exceeding two months, unless such fine and costs shall be sooner paid."

At the same meeting at which by-law No. 16 was passed, the Commission "entered into an agreement with and thereby gave the Ottawa Electric Railway Company the exclusive right to operate sight-seeing motor-busses for hire on the said driveway, and the Commission has ever since the adoption of the said by-law permitted the Ottawa Electric Railway Company to operate its sight-seeing busses on the said driveway."

The Red Line Limited was found running a sight-seeing bus on that part of the Commission's driveway which is in the Province of Ontario; and Ackland, a constable in the employ of the Commission, laid an information that it did "on the 26th day of July, A.D. 1929, unlawfully, at about 3.45 in the afternoon, operate or cause or permit to be operated upon the driveways or other property of the Federal District Commission, namely, upon part of the Island Park Driveway, which runs between the Richmond-road and the boundary of the Province of Quebec, a vehicle for the transportation of passengers for hire, namely, vehicle number C-2802 of the said company, being of the type commonly known as a sight-seeing bus, the said driveway or property being in the township of Nepean, contrary to the form of the by-law of the said Commission in such case made and provided and passed pursuant to the statutes of the Dominion of Canada relating thereto."

The charge came on for trial before the Police Magistrate for

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the County of Carleton, who dismissed the case. Thereupon, the informant applied for and obtained a Stated Case, and has brought the matter before this Court. I proceed to deal with it on the hypothesis that it is properly before us—a question which may be discussed later, if necessary.

The magistrate found that the driveway was “a highway within the meaning of the Highway Traffic Act,” i.e. R.S.O. 1927, ch. 251, in which the word “Highway” is defined by sec. 1 (f) as including “a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, designed and intended for, or used by, the general public for the passage of vehicles.”

I am unable to see how this finding at all advances the case of the defendant—it may well be that all the provisions of the Highway Traffic Act apply to traffic upon this roadway, but it in no way gives any rights to any one to use the road in any particular way—these rights come to the traveller from the Common Law.

The driveway being upon the property of the Commission, I am wholly unable to see why it may not lay down conditions for its use, exclude any traffic it sees fit and admit what it sees fit—there is no dedication to the municipality, no total dedication to the public to use as the public sees fit, nothing which takes away from the elementary right which every one, individual or corporation, has to use his property according to his own wishes without regard to how some one else would like to use it—this, of course, in the absence of something in the nature of an easement, etc.

Nor does the fact of the Commission giving another company a privilege denied to this one help in the least; with their reasons, good or bad, for that course we have no concern—the Commission is the sole judge and must account to the proper parties, which we are not, for its actions.

As it seems to me, it is clear that the Commission had the right to refuse to the Red Line company the right to run sight-seeing busses on its driveway, whether it allowed another company to do this or not. The whole question in my mind is the right to have its by-law enforced in the manner set out in sec. 14 of by-law 14. And the determination of that question will depend upon the validity of the legislation of (1927) 17 Geo. V. ch. 55, sec. 4(2).

It is elementary that no such proceedings could be validly provided as to the breach of a by-law of a corporation, unless the corporation was given the power so to do, by competent authority. What is claimed for the Commission is that their works and under-

takings are by the Parliament of Canada declared to be "works for the general advantage of Canada" (sec. 12).

By sec. 92 (10) of the British North America Act, "Local works and undertakings . . . such . . . as . . . are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada" are excluded from the jurisdiction of the Provinces; and, by sec. 91 (29), "Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces" are subject to "the exclusive legislative authority of the Parliament of Canada."

The "local works and undertakings" which are "declared by the Parliament of Canada to be for the general advantage of Canada" are expressly excepted in the enumeration in sec. 92 of subjects assigned to the Legislatures of the Provinces; and, consequently, in my view must fall to the Dominion under this sec. 91 (29). The same result follows from the provision, earlier in sec. 91, for the jurisdiction—the exclusive jurisdiction—of the Dominion "in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

We have neither the power nor the desire to enter into the propriety of the legislation, it is our function *dicere non dare*; and we take the law as it has been made for us; on that law, I can see no escape from the conclusion that the undertakings of the Commission are subject to the exclusive authority of the Dominion Parliament. And the fact, if it is a fact, that the rules of the road, etc., prescribed by the Ontario Highway Traffic Act, mentioned above, apply to persons using the driveway of the Commission, has no more effect upon the powers of the Dominion than the fact that the provisions of the Quebec legislation apply to the ditches of the Canadian Pacific Railway removed that undertaking from the jurisdiction of the Dominion: *Canadian Pacific Railway Co. v. Corporation of Notre Dame de Bonsecours*, [1899] A.C. 367.

The question of the delegation of such powers by the Legislature has been so often and so fully discussed that it is not necessary to go into the matter again. In the Divisional Court, the case of *Township of Sandwich East v. Union Natural Gas Co.*, 57 O.L.R. 656, affirming the judgment in 56 O.L.R. 399, is a recent instance—some of the cases are quoted in the original judgment. I have read the numerous cases cited to us and some others, but there seems no good reason to doubt the authority of the Dominion Parliament to give the power complained of to this Commission.

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The questions in the case stated will be answered in accordance with the views taken in these reasons for judgment.

The Red Line Ltd. should pay the costs of the proceedings before us.

MIDDLETON, J.A.:—The right of the Dominion to control and regulate its own property appears to me to be incontestable and not to call for any elaborate discussion. The Commissioners appointed by the Dominion are answerable to the Dominion Government and not to the Courts as to the way in which the powers entrusted to them are exercised.

The law of property and civil rights assigned to the Province referred to that branch of the law as between subject and subject, and has no application to the Crown.

MASTEN, J. A.:—Appeal by the private prosecutor (Ackland) by way of stated case, pursuant to sec. 761 of the Criminal Code, from an order dated the 23rd August, 1929, made by William Joynt, Esquire, Police Magistrate for the County of Carleton, whereby he dismissed the complaint of the appellant.

The stated case so submitted reads as follows:—

“1. The complainant, being a person aggrieved by my order dismissing the summons or charge herein and desiring to question the said order on the ground that it is erroneous in point of law, has applied to me to state and sign a case setting forth the facts of the case and the grounds on which the said order is questioned, and, pursuant to such application, I hereby state and sign such case.

“2. The information laid in this matter was that Red Line Limited did on the 26th day of July, A.D. 1929, unlawfully, at about 3.45 in the afternoon, operate or cause or permit to be operated upon the driveways or other property of the Federal District Commission, namely, upon part of the Island Park Driveway, which runs between the Richmond-road in Ontario and the boundary of the Province of Quebec, a vehicle for the transportation of passengers for hire, namely, a vehicle number C-2802 of the said company, being of the type commonly known as a sight-seeing bus, the said driveway or property being in the township of Nepean, in Ontario, contrary to the form of the by-law of the said Commission in such case made and provided and passed pursuant to the statutes of the Dominion of Canada relating thereto.

“3. The driveway in question runs from Richmond-road in the township of Nepean, in the Province of Ontario, by means of a roadway, to the shore of the Ottawa river at a point where a bridge

crossing the Ottawa river and erected and owned by the Federal District Commission runs to and across the inter-provincial boundary in the Ottawa river into the Province of Quebec.

"4. Red Line Limited operated a sight-seeing bus for hire at the time mentioned in the said information on Island Park Driveway and on the said bridge.

"5. I made the further finding of fact that there is considerable vehicle traffic upon the said roadway and bridge amounting to from 700 to 800 motor-cars in one hour on one occasion, and I found that such roadway is a highway within the meaning of the Highway Traffic Act.

"6. By deeds Nos. 35686 and 35687, dated the 9th February, 1922, and filed as exhibits on the hearing herein and attached to this form of case, title to the roadway hereinabove referred to became vested in the Federal District Commission through its predecessor, the Ottawa Improvement Commission, which in turn acquired title from the grantors referred to in the said deeds. The grants were made on certain conditions set forth in the above mentioned deeds. The construction of the roadway on the said property so purchased was commenced by the Commission in the spring of 1922, after the snow left the ground.

"7. Other relevant facts are set forth in the evidence and exhibits attached hereto and are not contradicted and are not necessary to especially enumerate here.

"8. At the meeting of the Commission at which said by-law Number 16 was adopted, the Commission entered into an agreement with and thereby gave the Ottawa Electric Railway Company the exclusive right to operate sight-seeing motor busses for hire on the said driveway, and the Commission has ever since the adoption of the said by-law permitted the Ottawa Electric Railway Company to operate its sight-seeing busses on the said driveway. The complainant is a constable of the Federal District Commission.

"9. The grounds upon which the said order is questioned may be shortly set forth as follows:—

"(a) That my said order is erroneous in point of law.

"(b) That the defendant should have been found guilty of the charge in question.

"(c) That the said by-law and statute are *intra vires* of the Commission and the Dominion of Canada respectively.

"(d) That a finding that the roadway and the bridge in question are highways within the meaning of the Highway Traffic Act is immaterial to this litigation, and in any event does not justify the conclusions arrived at by me, and which are based upon the said finding.

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“(e) That I erred in the following respects:—

“(1) In finding that the said roadway is a highway within the meaning of the Highway Traffic Act.

“(2) In finding that for that reason such part of the Federal District Commission Act as empowers that body to pass by-law No. 16 of the Commission (being the by-law in question herein) is *ultra vires* of the Government (Parliament) of the Dominion of Canada.

“(3) In finding that the Ontario Legislature alone can regulate the vehicular traffic on the said roadway.

“(4) In holding that in the absence of provincial legislation prohibiting vehicular traffic such as that complained of herein the charge must fail.

“(5) In holding that the said roadway and the said bridge do not come within the category of undertakings excepted from the jurisdiction of the Ontario Legislature.

“(6) In refusing to permit the witness Stuart to give evidence (a) as to the extent and nature of the injury or damage inflicted upon the Commission's said driveway by the operation thereon of the kind of busses prohibited by the said by-law, (b) as to the practice of the Commission with reference to commercial traffic on the said driveway and the restrictions on, and the limited nature of, the use thereof permitted to the public.

“(7) In holding that no portion of the said roadway and the said bridge is a ‘work’ or ‘undertaking’ within the meaning of head 10 of sec. 92 of the British North America Act.

“10. The following exhibits are attached hereto and are part of this case:—

“(1) Deed from Robert Henry Cowley to the Ottawa Improvement Commission, registered on the 23rd June, 1922, in the County of Carleton registry office as No. 35686.

“(2) Deed by Daniel Keyworth and Robert Henry Cowley, trustees, registered on above date as No. 35687.

“(3) By-law number 16 of the Federal District Commission, passed the 15th June, 1929.

“(4) Section 14 of by-law number 14 referred to in sec. 3 of by-law number 16, above mentioned.

“(5) Order in council number 1226 of 1929, dated the 23rd July, 1929, duly approving by-law number 16, above mentioned.

“11. I found the defendant not guilty of the offence charged.

“12. Was I right in holding that the defendant company committed no offence, as charged, in operating or causing or permitting to be operated upon the driveways described in the said

charge the vehicle of the said company described in the said charge, for the transportation of passengers for hire?"

Section 761 of the Criminal Code reads as follows:—

"Any person aggrieved, the prosecutor or complainant as well as the defendant, who desires to question a conviction, order, determination or other proceeding of a justice under this Part, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to such justice to state and sign a case setting forth the facts of the case and the grounds on which the proceeding is questioned, and if the justice declines to state the case, may apply to the court for an order requiring the case to be stated.

"2. The application shall be made and the case stated within such time and in such manner as is from time to time directed by rules or orders made under section 576 of this Act.

"3. If there be no rule or order otherwise providing.

"(a) the application shall be made in writing to the justice and a copy thereof left with him, and may be made at any time within seven clear days from the date of the proceeding to be questioned:

"(b) the case shall be stated within three calendar months after the date of the application, and after the recognizance hereinafter referred to has been entered into; and

"(c) the applicant shall within three days after receiving the case transmit it to the court, first giving notice in writing of such appeal, with a copy of the case as signed and stated, to the other party to the proceeding which is questioned."

This section was interpreted by the Queen's Bench Divisional Court in *Rex v. Dominion Bowling and Athletic Club Ltd.* (1909), 19 O.L.R. 107, where Riddell, J., says:—

"I should add that I have not looked at the evidence. The police magistrate has made the evidence a part of the case—that he should not have done. The Act is precise that he should 'sign a case setting forth the facts of the case and the grounds on which the proceeding is questioned;' then our duty is to determine the 'questions of law arising thereon.' We should have nothing before us but the facts and the grounds aforesaid."

In the written reply filed by Mr. Quain, he says: "Clause 7 of the form of case recites that other relevant facts are set forth in the evidence and exhibits and are not contradicted, and are not necessary to especially enumerate here. The evidence is attached as part of the case."

And he then proceeds to enumerate many facts which he alleges to be relevant and which are abstracted from the evidence. Such

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App. Div. procedure is not warranted by sec. 761. Apart from this defect,
 1930. the procedure adopted by the complainant appears to me to be
 REX ill-adapted to the circumstances of the present case. This appel-
 v. late procedure was obviously intended to be applied only in minor
 RED LINE cases, tried before justices of the peace. It was intended for the
 LTD. settlement, etc., in an inexpensive manner, of a point of law.
 Masten, J.A. Facts are excluded. In pursuance of that intention, the appeal
 will hereafter be to a Judge in Chambers (see sec. 10 of 20 Geo.
 V. Ch. 21, adding subsec. 2 to sec. 3 of the Summary Convictions
 Act, R.S.O. 1927, ch. 121), and I have grave doubts as to the juris-
 diction of the Appellate Division to entertain the present appeal.

But, even if the Court has jurisdiction, it is obviously incon-
 venient and undesirable that the far-reaching constitutional
 questions here arising should be heard and determined, where the
 view which the Court must take and the considerations on which
 its conclusion must be founded are cribbed and confined by the
 insufficient statement of a special case.

However, the appeal was elaborately argued without objection,
 and without reference to the difficulties to which I have adverted.
 These do not seem insuperable to other members of the Court,
 and so I do not dissent from the conclusion at which the majority
 have arrived, reserving, however, to a more suitable occasion my
 opinions on the grave and far-reaching constitutional questions
 which were discussed.

ORDE, J. A.:—The facts in the present case and the legis-
 lation in question are set out sufficiently fully in the judgment of
 my brother Riddell to render it unnecessary to repeat them.

Though the point was mentioned, no objection was taken to
 the jurisdiction of the Appellate Division to hear an appeal
 upon a stated case involving the right to convict for an alleged
 infraction of a by-law passed under the authority of a Dominion
 statute. The situation is entirely different from that in the
 other Red Line case, namely, *Rex v. Red Line Ltd.* (1930), 65
 O.L.R. 11. There the case involved a conviction for the breach
 of a by-law passed under a provincial statute, and I held that
 the appeal by way of a case stated by the magistrate was direct
 to the Appellate Division, because of certain provisions of the
 Judicature Act. It may be noted, in passing, that the Ontario
 Summary Convictions Act, R.S.O. 1927, ch. 121, was amended at
 the last session of the Legislature, so that the appeal in such
 cases may now be taken to a single Judge in Chambers: 20 Geo. V.
 ch. 21, sec. 10.

This appeal comes by way of a stated case under sec. 761 of

the Criminal Code, R.S.C. 1927, ch. 36. By sec. 706, Part XV. of the Code applies to all offences against Dominion statutes punishable by summary conviction and to all cases over which the Parliament of Canada has legislative authority, where any justice of the peace is empowered to make an order for the payment of money. The prosecution here comes within these provisions.

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By sec. 766 of the Code, the authority and jurisdiction of the Court to which a case is stated may be exercised by a Judge of such Court sitting in Chambers. So that it seems to be quite clear that the stated case here ought to have gone to a single Judge of the High Court Division in Chambers.

As I have said, no objection was taken to our hearing the appeal, but our doing so ought not to be treated as justifying any departure from the proper practice.

The magistrate dismissed the charge for the alleged breach of the Commission's by-law, upon the grounds that the roadway upon the Commission's lands was a highway within the meaning of the Ontario Highway Traffic Act, R.S.O. 1927, ch. 251, that for that reason such part of the Federal District Commission Act as empowers that body to pass by-law No. 16, the by-law in question, is *ultra vires* of the Parliament of Canada, and that the Ontario Legislature can also regulate the vehicular traffic on the Commission's roadways; and he held that, the Provincial Legislature not having prohibited such traffic, the charge must fail. He was also of the view that the roadway and bridge of the Commission did not come within the category of undertakings excepted from the jurisdiction of the Ontario Legislature, and that no portion of the roadway and bridge was a "work" or "undertaking" within the meaning of head 10 of sec. 92 of the British North America Act.

It is, to say the least, refreshing that the magistrate should have felt himself qualified to dispose in such summary fashion of some of the constitutional problems which the highest judicial tribunals in the Empire find some difficulty in solving.

The argument before us resolved itself into a discussion of the points raised by counsel for the defendant, Red Line Limited, and for the Attorney-General of Ontario. Those points were, shortly:—

1. That the Federal District Commission Act, 17 Geo. V. ch. 55, was not within the competence of the Parliament of Canada.

2. That, if the Act itself is not *ultra vires*, the provisions of subsec. 2 of sec. 4, empowering the Commission to impose penalties for the infraction of its by-laws, are *ultra vires*.

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3. That the by-law in question is not within the terms of the Act, and is therefor invalid.

4. That, even if the by-law be valid, the evidence does not justify a conviction.

The attack upon the validity of the Federal District Commission Act was based largely upon two distinct grounds: first, that stated by Mr. Tilley, who argued that the Act had no relation to any of the matters specifically enumerated in sec. 91 of the British North America Act, and that its validity, if any, must rest upon one or other of the exceptions to para. 10 of sec. 92, which vests the legislative power over local works and undertakings in the Provinces; the other was that made by Mr. Bayly, who contended that the Parliament of Canada had no power to create a corporation and expressly clothe it with power to hold land.

It is, of course, obvious that if the subject-matter of legislation comes clearly within any of the three classes of exceptions to para. 10 of sec. 92, then it comes expressly within para. 29 of sec. 91, and so expressly within the Dominion power. But it was argued that the subject-matter of the Federal District Commission Act was not a work or undertaking within the meaning of para. 10 of sec. 92 at all, that if it comes within exception (a) the *ejusdem generis* rule would exclude it, and if within exception (c) the words "such works" must be limited to the same class of works as are referred to in exception (a), and so the Parliament of Canada had no power to declare, as it does by sec. 12 of the Federal District Commission Act, that the Commission's works and undertakings are works for the general advantage of Canada.

If the validity of the Act in question really turns upon the effect of sec. 12, I should find some difficulty in acceding to Mr. Tilley's argument. I do not think that the words "such works" in exception (c) of para. 10 of sec. 92 are to be restricted by any reference to exception (a) at all. There is no grammatical connection whatever. The exception is from the sweeping words "local works and undertakings" in the body of para. 10, over which the Provinces are given exclusive legislative jurisdiction. From these are excepted "such works, as although wholly situate within the Province, are . . . declared by the Parliament of Canada to be for the general advantage of Canada." If there is any restriction upon Parliament's power to make that declaration in any particular case, it must be sought for in exception (c) itself, and not by any reference to exception (a).

I think the presence of sec. 12 in the Act in question has been treated as if it were the sole foundation for the exercise of Parliament's legislative power to incorporate the Commission and to

clothe it with the powers purported to be given it by the Act. But the Act does not depend for its validity upon the exercise of Parliament's declaratory powers under exception (c) to para. 10 of sec. 92, though the fact that it has made the declaration may strengthen the argument for its validity.

Let us examine the Act itself. It creates a body corporate consisting of 10 members, of whom 9 are to be appointed by the Governor in Council, that is, the Government of Canada, one of them being a resident of the city of Hull, and the tenth is to be appointed by the Corporation of the City of Ottawa. The 9 appointed by the Government hold office during the pleasure of the Government. The chairman is chosen by the Government and holds office merely during pleasure. The Commission is empowered to acquire and hold real property within such area or district as the Government may designate for the purpose of public parks or squares, streets, avenues, drives, thoroughfares, or bridges, to build, maintain and repair works, to co-operate with municipalities for the improvement and beautifying of the same, etc., to grant concessions for places of refreshment, amusement or shelter, etc., and to expend for such purposes such moneys as are placed to its credit under the Act. All its moneys are to come from the Dominion Government. It cannot borrow except with the permission of the Government. It cannot acquire land without the previous consent of the Government, nor can it, by the provisions of the amending Act of 1928, 18 & 19 Geo. V. ch. 26, sec. 1, lease or sell any real property without the approval of the Government. Before making expenditures it must submit its estimates to the Minister of Finance, and no expenditure shall be made until approved by the Government, and its expenditures are subject to the audit of the Auditor-General, and it must annually send its financial statements to the Minister of Finance, and a report to Parliament.

Now, so far as its powers and objects are concerned, there is nothing in the Act to indicate that they are local in character or are to be confined to any one Province. They are really Dominion-wide in their range. But for the fact that one member of the Commission must be a resident of Hull and another must be appointed by the City of Ottawa and for the provisions for taking over the properties, etc., of the Ottawa Improvement Commission and the repeal of the Acts relating to that body, there is nothing in the Act to indicate that the works and undertakings of the Commission are local at all.

That the Parliament of Canada has very wide powers as to the creation of corporations having objects which are not pro-

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vincial, within the meaning of para. 11 of sec. 92, is now well-settled. As put by Lord Haldane in *John Deere Plow Co. Ltd. v. Wharton*, [1915] A.C. 330, at p. 340, "The power of legislating with reference to the incorporation of companies with other than provincial objects must belong exclusively to the Dominion Parliament, for the matter is one not coming within the classes of subjects . . . assigned exclusively to the Legislatures of the Provinces, within the meaning of the initial words of sec. 91, and may be properly regarded as a matter affecting the Dominion generally and covered by the expression 'the peace, order, and good government of Canada'." Or again by Lord Haldane in *Great West Saddlery Co. Ltd. v. The King*, [1921] 2 A.C. 91, at p. 114: "For the power of a Province to legislate for the incorporation of companies is limited to companies with Provincial objects, and there is no express power conferred to incorporate companies with powers to carry on business throughout the Dominion and in every Province. But such a power is covered by the general enabling words of sec. 91, which, because of the gap, confer it exclusively on the Dominion."

As I have said, the Act contains nothing to indicate that its objects are merely provincial. Treated merely as an exercise of the legislative power to create a body corporate, there can be no doubt, in my judgment, that the Act is within the powers of the Dominion Parliament.

Mr. Bayly suggested that Parliament had no power to create a corporation with power to hold lands, citing the *John Deere* case, *supra*, but I cannot find that the case supports the suggestion. The corporate power or capacity to hold land is quite a different thing from the corporate right to hold it in breach of any Provincial mortmain laws. It is surely possible for the Dominion Parliament to incorporate a company with a Dominion-wide corporate power or capacity to buy and sell land or to engage in the business of agriculture, leaving it to the company to acquire its lands according to any provincial mortmain laws affecting companies generally.

The attack upon the Act was made from the aspects which I have already dealt with. Even from those aspects the attack, I think, fails. But the validity of the Act can be based upon what, in my judgment, are more substantial and satisfactory grounds than those I have mentioned. Too much stress has been laid upon the fact that the Act incorporates a Commission to carry out its objects and as if the incorporation of the Commission were its primary purpose. It is not in that light at all that I regard the Act. It is really an Act to carry out the desire of Parliament to

expend public moneys, belonging to the people of Canada in the right of the Dominion Government, in the acquisition of lands to be devoted to the benefit of the public in the form of parks, squares, avenues, drives, etc. For the purpose of carrying out that intention, a Commission is incorporated and the lands are to be vested in it. But, though so vested, its title is of necessity merely that of a trustee for the Crown. The Commission can neither buy nor sell without the consent of the Government. It has no money of its own. Every cent comes from the Government or from the revenues derived from concessions or leases. Nothing can be spent without Government consent. And it has no control over its own membership which is at all times subject to the pleasure of the Crown.

Mr. McCarthy argued that the Act came within para. 1 of sec. 91, "The Public Debt and Property," and that, as all the lands and moneys of the Commission really belong to the Crown in the right of the Dominion, the Act is really one which legislates upon the subject of public property, and is therefore valid under that head.

If we were bound to seek for one of the classes of subjects enumerated in sec. 91, upon which to justify the legislation, it might well be found in para. 1, as Mr. McCarthy argues, but the Act, would, in my opinion, be just as valid if the words "The Public Debt and Property" had never formed part of sec. 91 at all. There must, of necessity, be an inherent power in the Parliament of Canada to say what the Government may do with public moneys, and it seems to me that the legislation is fully justified under the general power "to make laws for the peace, order, and good government of Canada."

During the argument I referred to the incorporation of the "National Battlefields Commission" by the Dominion Parliament, for the purpose of preserving the Plains of Abraham at Quebec, as an example of Dominion legislation which would be invalid if the defendant's contentions were sound. I have since looked at the Act, which was passed in 1908, 7 & 8 Edw. VII. ch. 57. The Act is in form very like the one in question here, so much so in fact that it may perhaps have served as a model. But there are two striking features of it, namely, the lands to be acquired are to be in the city of Quebec or in the vicinity thereof, and there is no declaration that the works are for the general advantage of Canada.

The fact that Parliament has on other occasions passed legislation authorising the expenditure of public money in the acquisition of lands for public purposes and creating a corporate body

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for administrative purposes, is not, of course, a ground for holding that legislation of that character is valid. I refer to the National Battlefields Act merely because it serves to illuminate the situation, and to shew that the purposes and objects of Dominion legislation may be national in character even where the lands to be acquired and cared for are wholly within one Province. While the lands and in that sense the "works" are local, the moneys expended are national, the lands themselves belong to the Dominion, and the whole subject-matter of the legislation is therefore removed from the ambit of the provincial jurisdiction.

The Act in question here is, in my opinion, fully within the competence of the Parliament of Canada.

It is, however, contended that, though the Act may be substantially valid, the attempt to confer power upon the Commission, by subsec. 2 of sec. 4, to impose penalties for the infraction of its by-laws, is *ultra vires*. The only authority cited for this was the *Board of Commerce* case, [1922] 2 A.C. 191. But I do not see how anything decided there is applicable. The legislative power, whether Dominion or Provincial, to vest in public and quasi-public bodies authority to impose penalties for the infraction of by-laws, necessary for carrying on their undertakings, such as railway companies for example, is well recognised. I think this objection fails.

Nor do I see upon what ground it can be held that by-law No. 16 is invalid. It is true that, in addition to a prohibition against any person's operating upon the Commission's driveways any vehicle for the transportation of passengers for hire, there is also a prohibition against operating any vehicle which the Commission may deem to be in competition with any person to whom the Commission has granted exclusive rights. It is argued that the by-law is therefore discriminatory. But why may it not be discriminatory? I do not think that the principle upon which certain types of by-laws have been invalidated for discrimination applies to by-laws passed by a body such as this. If the Federal District Commission sees fit, with Government approval, to exclude some persons or their vehicles from their property, that is from the property of the Dominion Government, and to admit others, who is to prevent it? May the Government, through its own administrative body, not do what it pleases, subject to the control of the Parliament of Canada, with its own? I can see no more reason why the Commission, with Government approval, may not exclude whom it pleases from its grounds than why the Government of Canada may not exclude whom it pleases or what vehicle it pleases from the grounds surrounding the Parliament Buildings at Ottawa.

I desire to add a few words as to the magistrate's views with regard to the application of the Ontario Highway Traffic Act. I gather from the stated case that because the roadways on the Commission's property were "highways" within the meaning of the Highway Traffic Act, the Commission had no power to exclude the defendant. Whether or not the roadways of the Commission are "highways," as defined by the Highway Traffic Act, may be a nice question. For the purposes of that Act they may well be, because otherwise what rules of the road would apply to traffic not only upon the driveways of the Commission but in other public grounds, like those of the University of Toronto, for example?

But, while they may be highways for the purpose of the Highway Traffic Act, they are clearly not highways in the true sense. The Commission has clearly the right to close up or alter its roadways as it pleases, just as any public hospital or college or university might close up or alter the location of its roadways. Such roadways are public only in the sense that the public is permitted by the owner to use them. They are not thereby dedicated to the public in such a way as to deprive the owner of all title or control.

I think the question submitted should be answered in the negative, and a conviction entered against the defendant for the offence charged.

FISHER, J.A., agreed with RIDDELL, J.A.

Appeal allowed.

[LOGIE. J.]

STOLP & Co. v. W. B. BROWNE & Co.

1930.

Judgment—Action on Foreign Judgment—Award—Order of Court of Record Making Executory—Whether "Judgment"—Absence of Notice to Parties—Procedure—Finality of Judgment.

June 25.

In an action in Ontario upon a judgment recovered in Holland, it appeared that the judgment was pronounced by a court of record and directed that an award of arbitrators should be executed after its form and contents and in the ordinary way of execution; and that no notice was given to the defendants, who were parties to the arbitration:—

Held, that the requirement of notice or no notice is a matter of procedure; and, as it was shewn that in Holland no notice was necessary, the lack of notice did not affect the validity of the judgment in Holland.

It was a final and conclusive judgment and could be sued upon in Ontario, subject to such defences as were available, as a foreign judgment.

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The award and the order enforcing it came within the definition of a foreign judgment given in Piggott's *Foreign Judgments and Jurisdiction* (1908), p. 95, sec. iv.

IN an action upon a foreign judgment, brought by N. V. Handelmaatschappij Stolp & Co., a body corporate incorporated according to the laws of Holland, the plaintiffs moved for an order for the issue of a foreign commission for the examination of witnesses at Amsterdam, Holland.

The motion came before McEvoy, J., who directed that a question of law arising upon the pleadings should be determined before the trial, and enlarged the motion for a commission.

June 23. Argument upon the motion and the question of law was heard by LOGIE, J., in the Weekly Court, Toronto.

R. D. Moorhead, for the plaintiffs.

Lyle Ramsey, for the defendants.

June 25. LOGIE, J.:—Motion by the plaintiffs for a commission to examine witnesses on their behalf at Amsterdam, in the Kingdom of Holland, the depositions to be used on the trial of this action, and that the trial be stayed until the return of such commission. This motion was originally made before the Master, but was by consent brought on before McEvoy, J., who thought there was a question of law upon the pleadings which should be determined before the trial, and accordingly a motion was made before me on the 9th June and enlarged until the 23rd June, when the point of law was argued.

The plaintiffs were commission agents or brokers dealing in flour, among other things, with head office in the city of Amsterdam, in the Kingdom of Holland; and the defendants were millers and flour exporters with head office in the city of Toronto. In the month of February, 1923, the plaintiffs and defendants entered into an agreement in writing whereby the plaintiffs were to represent the defendants in Germany, Austria, and Cesko-Slovenska, as sole commission agents in the sale of flour, for which they were to receive a commission and a cash discount. It was a term of the agreement that, in the event of any disputes arising between the parties in respect to this agreement, these disputes were to be settled by arbitration according to the rules of the Netherlands Flour Trade Association, in the Kingdom of Holland, otherwise known as "The Dutch Association of Dealers in Foreign Flour," or "Nederlandsche Vereeniging van Handelaren in Buitenlandsch Meel."

In the course of dealing between the parties disputes did arise; the plaintiffs asserted that the defendants failed to make delivery of flour on time, in breach of the agreement between them, at Amsterdam, and alleged notice in writing to the defendants to proceed under the terms of the agreement to have their disputes settled by arbitration at Amsterdam, and that notice was given to the defendants according to the law of Holland of the hearing by a board of arbitrators. It is alleged by the plaintiffs and denied by the defendants that the defendants were represented before the board of arbitrators by one C. F. G. Raikes, Esquire, of London, England, who, the plaintiffs allege, took part in the proceedings and argued the merits for the defendants on the said hearing. The capacity in which Raikes attended the arbitration is said by the defendants to have been that of a mutual friend of both parties.

An award was made in favour of the plaintiffs on or about the 15th day of November, 1924, which award, it was alleged, was mailed by registered letter to the defendants' alleged representative, C. F. G. Raikes, at London, England, on or about the 10th day of December, 1924, although it is alleged that, according to the law of Holland, it was not necessary that any notice of the award should be given either to or by the plaintiffs or the defendants.

In due course, pursuant to the law of Holland, the arbitral sentence or award was presented to the Chancery office of the Arrondissement Tribunal at Amsterdam, by one of the arbitrators, who deposited the same, as required by law, in the said Chancery office, and requested that the same be made executory as required by article 642 of the Code of Civil Procedure of Holland, and the said award was duly made executory or a judgment of the Arrondissement Tribunal accordingly, conformable to the law of Holland, by Westenberg, President of the Arrondissement Tribunal, on the 6th day of January, 1925; whereupon, it is alleged by the plaintiffs, the award acquired the same executory force as a judgment of the Arrondissement Tribunal or Court of Chancery, a Court of record in and for the Kingdom of Holland.

It is alleged by the plaintiffs that on or about the 15th day of April, 1925, an official and legal notice that the award had been deposited and had acquired executory force as a judgment of a Court of record, accompanied with an exemplification of the award, was dispatched to and received by the defendants on or about the 30th day of April, 1925, and that the defendants did not appeal from the said award or judgment, although they had three months, according to the law of Holland, within which to do so.

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The plaintiffs sue upon the judgment of the Arrondissement Tribunal or Court of Chancery, by a specially indorsed writ, in the Province of Ontario; and the question for me is whether such a judgment can be sued on in Ontario.

The defendants contend that the document produced as a judgment is not in reality a judgment of the Court at all, but that the effect of the certificate attached to the award is merely an order upon which execution could issue in Holland, and is not such a judgment as could be sued on in Canada.

It is admitted by the defendants that the law of Holland is accurately set out in the material, and by that law no notice is necessary of the proceedings in the Court of Chancery in Holland to or by either party, but that either party may without notice file the award and get his certificate.

For the defendants Mr. Ramsey contends that, although this is the law of Holland, it has this effect, that where no notice is given the judgment is obtained without notice, and is not such a judgment as would be enforced in Canada, and that all the Court can look at is the judgment itself, upon which the plaintiffs base their claim, and see whether it is or is not a judgment enforceable by our Courts; that the judgment shews that it is an arbitral sentence of a foreign board of arbitrators and not a judgment of a Court of record; that the sentence is not a judgment of the Court of Chancery, but of the arbitrators; that the order is an order of execution merely and not a judgment after a trial on a hearing.

The award sets out the facts, the reasons for the award, and the award or arbitral sentence. The following order is appended:—

“In the Queen’s name.

“We, President of Arrondissement Tribunal at Amsterdam;

“Seeing the above mentioned sentence;

“Seeing article 642 of the Code of Civil Law;

“Order, that this sentence shall be executed after its

“form and contents and in the ordinary way of execution.

“Done at Amsterdam, January 6th, 1925.”

(Signed) “Westenberg.”

The order was sealed with the seal of the Court of Chancery.

Article 642 of the Code of the Civil Law of Holland reads as follows:—

“The award of arbitrators shall be executed by virtue of an order of the President of the District Court of First Instance, mentioned in article 630. This order shall be written on the original and be transcribed on the copy issued.”

Nicolaas Okma, of the City of Amsterdam, barrister-at-law, sets out the appropriate law of Holland. His statement of the

law, as I have said, is admitted to be correct, and by paragraphs 8 and 9 of his affidavit he makes the following statements:—

“8. Under and by virtue of article 639 of the Code of Civil Procedure the said award or arbitral sentence was presented to the Chancery office of the Arrondissement Tribunal at Amsterdam by M. Jochems Azn, one of the arbitrators, who deposited the same as required by law in the Chancery office and requested that the same be made executory, as required by article 642 of the Code of Civil Procedure of Holland, and that the award was duly made executory accordingly and conformable to law, by Westenberg, President of the Arrondissement Tribunal, on the 6th day of January, 1925, whereupon the same acquired the same executory force as a judgment of the Arrondissement Tribunal or Court of Chancery, a Court of record in and for the Kingdom of Holland.

“9. No notice to either party that the award was to be pronounced or to be deposited in the Chancery Court was necessary, and an arbitral award is never pronounced in the presence of the parties. The defendant was not in law entitled to receive any other notice of the award than was sent to it or to Mr. Raikes, as herein explained.”

A foreign judgment means a judgment, decree, or order of the nature of a judgment (by whatever name it be called), which is pronounced or given by a foreign Court; Dicey, Conflict of Laws, 3rd ed., pp. 386, 387.

I will dispose of Mr. Ramsey's contention that because the defendants received no notice of the proceedings in the Arrondissement Tribunal or Court of Chancery, consisting of the filing of the award and the granting of the certificate, there is not a judgment which can be sued on in Ontario. In my opinion, the requirement of notice or no notice is a matter of procedure, and, as is said by Dicey, 3rd ed., pp. 37 and 38:—

“The rights as respects procedure of the parties to a suit are utterly unaffected by any foreign law . . . The practice of a Court is determined by the views entertained in the country to which the Court belongs of the right method of compelling the attendance of the parties, of obtaining evidence, and so forth . . . Matters of procedure are in no sense rights of individuals, they are practices of a Court adopted in accordance with the Court's general views of expediency or of justice.”

And so a judgment obtained in a court of Holland according to the practice of that court is valid in Holland so far as practice is concerned, irrespective of the practice which obtains in Canada; and, of course, the converse is true, that, when the plaintiff sues in Ontario upon his judgment, he must comply with the practice

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of the Ontario court. I am therefore of opinion that the lack of notice alleged by the defendants does not affect the validity of the judgment in Holland.

It was contended by the defendants that the case was governed by *Merrifield Ziegler & Co. v. Liverpool Cotton Association Ltd.* (1912), 105 L.T.R. 97; but, upon reading that case, it appears that the plaintiffs sued upon the award itself; and, as Eve, J., put it at p. 106, the sole point remained whether the award was a decision which the Court here ought to recognise as a foreign judgment, and in his opinion the award in itself was not such a judgment. "Although as between the parties it is conclusive upon all matters thereby adjudicated upon, and is therefore in a different category to the 'remate' judgment dealt with by the House of Lords in *Nouvion v. Freeman* (1889), 15 App. Cas. 1; it has no further force or effect unless and until the Court determines that it is an adjudication made in proceedings regularly conducted upon matters really submitted to the jurisdiction of the tribunal. It is not even as though the award were enforceable unless the Court stays its operation; the contrary is really the case, and for all practical purposes it is still-born until vitality is enfolded into it by the Court. It is then, for the first time, endowed with one, at least, of the essential characteristics of a judgment—the right to enforce obedience to it. This stage has not been reached with the award under consideration."

Turning to Piggott's *Foreign Judgments and Jurisdiction* (1908), p. 95, sec. iv., dealing with "Decisions of Non-judicial Tribunals or Bodies," the author says:—

"The definition of a 'foreign judgment' implies that the Court which has pronounced it is a judicial tribunal established by the Government of the country in which it exercises its jurisdiction, or by some other Government with its authority. The tribunal must be a Court of Law within the ordinary meaning of that term."

The award and the order enforcing it fulfil these conditions.

And again (pp. 95 and 96): "The decision of a dispute by any other person or body, even with consent of the parties, does not amount to a judgment; the remedy in case of failure to carry out the decision would probably lie on the contract to refer the dispute and accept the decision. Thus, an award of an arbitrator abroad does not come within the definition of a foreign judgment until it is made an order of Court; it is then merged in that order, which is in effect the judgment of the Court in the matter."

I am of opinion that the order of Westenberg, not having been

appealed against, is a final judgment or a final determination of the matters in question between the parties, and, not having been appealed against, was unalterable and conclusive in the Court, a Court of record, which pronounced it, so far as the Kingdom of Holland is concerned, and may be sued upon in Canada, subject to such defences as are available, as a foreign judgment.

The action will therefore proceed to trial on the pleadings, and the usual order may go for a commission for the examination of witnesses on both the plaintiffs' and defendants' behalf at the city of Amsterdam, in the Kingdom of Holland, or elsewhere, and that the trial of the action be stayed until the return of such commission.

Costs of this motion to be costs to the plaintiffs in any event.

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[APPELLATE DIVISION.]

SNYDER'S LTD. v. FURNITURE FINANCE CORPORATION LTD.

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June 30.

Contract—General Assignment of Book-debts to Plaintiff as Security for Existing and Future Debts of Assignor—Registration—Effect of—Assignment of Book Debts Act, R.S.O. 1927, ch. 166—Prior Assignment to Defendant of Conditional Sale Contracts—Conveyancing and Law of Property Act, R.S.O. 1927, ch. 137, sec. 49—Choses in Action—Equities—Notice—Novation—Failure of Action for Account.

The plaintiff company, a manufacturer, before the 5th August, 1927, had sold manufactured goods to F., a retail dealer, upon credit, and on that day F. assigned to the plaintiff company his existing and future book-debts as security for his indebtedness. The assignment was duly filed in the proper office, as required by the Assignment of Book Debts Act, R.S.O. 1927, ch. 166. F. had previously entered into an arrangement with the defendant corporation that, when he sold his furniture retail, he would obtain a cash deposit of not less than 25 per cent., and take a lien upon the goods sold for the balance of the sale-price, and then assign the lien-security to the defendant corporation, which was then to advance the balance of the sale-price, less a service charge of 6 per cent. After the 5th August, F. continued to sell his furniture, and assigned the purchasers' conditional sale contracts to the defendant corporation. The plaintiff company in this action alleged that, under the assignment to it by F. of his book-debts, it was entitled to all moneys received by the defendant corporation under these contracts which were assigned to it by F., and asked for an accounting and payment over:—

Held, that the action failed and was properly dismissed by the trial Judge.

Per LATCHFORD, C.J.:—It was never in the contemplation of the parties to the August assignment that the conditional sales agreements, covered, as the parties knew, by the previous contract between F. and the defendant corporation, should be affected by the subsequent assignment of F.'s book-debts.

Per ORDE, J.A.:—The Assignment of Book Debts Act confers no greater right upon an assignee of a chose of action than he had before. All

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it does is to make a general assignment of book-debts void, as against creditors and subsequent purchasers or mortgagees in good faith and for value, unless registered. By registration the plaintiff company had preserved whatever rights it acquired by virtue of the assignment and no more.

The form of conditional sale contract used by F. contained an express provision that the contract might be assigned to the defendant corporation. This right reserved by F. as a term of the contract was an equity to which the plaintiff company's assignment was subject, upon the principle exemplified by *Government of Newfoundland v. Newfoundland Railway Co.* (1888), 13 App. Cas. 199, and other cases. When F. exercised that right, there was in fact, as the result of the bargain between himself and his customer, a complete novation whereby the purchaser became indebted to the defendant, and there was nothing left upon which the plaintiff company's assignment could operate, so far as any debt due by the purchaser to F. was concerned. The defendant corporation became absolutely entitled as against the plaintiff to the moneys payable by the customer; and, if any equities arose out of the transaction, that of the defendant corporation was higher than that of the plaintiff company. There was no evidence that the defendant corporation had notice of the existence of the plaintiff company's assignment, and there is nothing in the Act to make mere registration notice to the world at large.

AN appeal by the plaintiff company from the judgment of the County Court of the County of York (DENTON, Co. C.J.), delivered on the 3rd January, 1930, dismissing an action for an account and other relief.

The reasons for judgment of the County Court Judge were as follows:—

The facts of this case are not in dispute, and, as I have had time to consider the case since the argument took place some weeks ago, I shall give judgment now.

The pleadings, the admissions contained therein, the written admissions filed, apart from the pleadings, and the affidavit of one witness, Jesse Fagel, shew the facts to be as follows:—

The plaintiff is a corporation having its head office in the town of Waterloo, and carries on business as a furniture manufacturer. The defendant is a corporation having its head office in Toronto, and carries on the business of a finance corporation. Prior to the 5th August, 1927, the plaintiff had sold manufactured furniture and materials which go into manufactured furniture to one John S. Fagel, a retail furniture dealer in Toronto; and on the 5th August, 1927, the plaintiff, for valuable consideration, obtained from Fagel an assignment of his existing and future book-debts, which assignment was duly registered or filed in the office of the clerk of the County Court, pursuant to the provisions of the Assignment of Book Debts Act.

After the 5th August, 1927, the plaintiff continued to supply manufactured furniture and materials to the said Fagel. On the

29th December, 1926, Fagel entered into an arrangement (exhibit 3) with the defendant corporation. This arrangement was that Fagel, when he sold his furniture retail, would obtain a cash deposit of not less than 25 per cent., and take a lien, upon the form provided by the company (known as the York plan), upon the goods sold for the balance of the sale-price; that the time of payment on the said lien should not extend longer than a period of 6 months; that Fagel was then to assign such lien-securities to the defendant, and the defendant was to advance the balance of the sale-price of the said goods sold, less a service charge of 6 per cent.

After the 5th August, 1927, when the plaintiff obtained the assignment of book-debts from Fagel, he, Fagel, continued to sell his furniture, obtaining a 25 per cent. deposit, and taking from the purchaser a contract (exhibit 2) which is called the York plan contract. This contract is signed by the purchaser in each case, and, after stating the purchase-price, and adding on the 6 per cent., and after giving credit for the 25 per cent. paid in cash, goes on to provide that the purchaser shall make monthly payments and that the title to the chattels shall not pass to the purchaser until all instalments and interest shall be fully paid in cash. It further provides that upon default of payment or breach of the conditions, the whole purchase-money with interest shall forthwith become due and payable at the option of the vendor. It further provides that upon default the vendor may enter upon the premises where the chattels may be located and remove and sell the same.

On the back of these York plan contracts there is an assignment by Fagel to the defendant in this action of his right, title, and interest in and to the contract, the sums payable thereunder, and the property therein described.

The plaintiff company brings this action alleging that under the assignment to it by Fagel of his book-debts it is entitled to all moneys received by the defendant under these contracts, known as the York plan contracts, which were assigned to it by Fagel, and it asks for an accounting of all these moneys and payment over.

The only evidence given at the trial was given by Fagel, who swore (and it is not denied) that 90 per cent. of his retail business was done on credit; that is to say, that, as to 90 per cent. of his business, the goods were sold conditionally on the York plan, and that the contracts were duly assigned to the defendant. He also says that the plaintiff in this action knew at the time that Fagel gave the assignment of book-debts to it, that he, Fagel, was selling under what is known as the York plan, and not only that,

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but that he was assigning these conditional sale contracts to the defendant, and borrowing money on them for the purpose of financing his business.

This case was argued as if it were a question of whether, as between the parties to this action, the Assignment of Book Debts Act or the Conditional Sales Act is to prevail. In one sense, that is the real point in the case, because it would appear that the same chose in action is vested in both the plaintiff and the defendant; but the Assignment of Book Debts Act and the Conditional Sales Act deal with separate and distinct things, the one with the assignment of debts only, the assignment of choses in action, and the other with the title to personal property, together with the debt or chose in action which the retention of the ownership in the property is designed to secure.

For a proper understanding of the purpose and meaning of the Assignment of Book Debts Act, it is important to know what the law was before that Act was passed. It was decided in *Tailby v. Official Receiver* (1888), 13 App. Cas. 523, at p. 533, that choses in action, though not yet existing, may nevertheless be the subject of a present assignment at common law. In other words, that a general assignment, for valuable consideration, of a debtor's present and future book-debts, was valid, and if notice was given to the debtor it was good even against purchasers for value. The Assignment of Book Debts Act was first passed in 1923, 13 & 14 Geo. V. ch. 29, and all it provides is that every such assignment shall be absolutely null and void as against the creditors of the assignor and against subsequent purchasers or mortgagees of such debts, unless the assignment is registered or filed.

Now, this Act was amended in 1927, by 17 Geo. V. ch. 43, adding to the original Act, sec. 4a., which provides that the Act shall not apply to an assignment of debts accruing due under specific contracts, which means only this, that if a creditor has an assignment to himself from the debtor of a specific debt, then, in that case, it shall not be necessary to have the assignment filed in the office of the County Court clerk; in other words, if he gives due notice to the debtor, he can sue the debtor and obtain judgment without any registration in the County Court office at all. That is all that the amendment of 1927 means.

And so with the Conditional Sales Act. Before that Act was passed, the common law allowed conditional sales to be made, under which the vendor retained ownership in the goods until the purchase-price was paid. Barron on Conditional Sales, 3rd ed., pp. 1 and 2, and the authorities there cited, shew this. All that the Conditional Sales Act provides is that as against a subsequent

purchaser in good faith, without notice and for valuable consideration, the provision for retaining ownership in the vendor until payment of the purchase-price is made shall be invalid, unless the contract is registered or filed. Exception is made in the case of a contract respecting certain classes of household furniture. Now, one of the sales made by Fagel was to a man named Finegan (and I am taking Finegan as a type of many others). Finegan bought a Chesterfield from Fagel under the contract known as the York plan. Under that contract, ownership in the goods remains in Fagel. Fagel transferred, for valuable consideration, the ownership in the goods to the defendant, together with his right, title, and interest in the contract. The defendant, therefore, had vested in it not only the ownership in the goods, but apparently the right to recover the amount from Finegan and the plaintiff, under the general assignment to it of Fagel's book-debts, and also appears to have the same right to recover the same debt. I say "appears to have," because, for a reason that I shall mention shortly, I think it has not that right.

The defendant is in this position: It can say to Finegan, "You cannot acquire ownership in this Chesterfield sold to you by Fagel until you pay us the purchase-money. If you pay the plaintiff under the general assignment to it of Fagel's book-debts, you are doing so at your own risk, because payment to it is not a payment which will help you to acquire ownership." Title to and ownership in the goods is one thing, and the debt is another thing; or, it may be put this way, that payment to the plaintiff would be a payment on the debt or chose in action or whatever you like to call it, whereas payment to the defendant, the Furniture Finance Corporation, would be in the nature of redemption-money. Now, it is considerations such as these that lead me to think that the Legislature could never have intended to include within the term "book-debts" a contract of which the Finegan one is a type. In other words, I hold that the debts created under what are known as conditional sales, which debts, after conditional sale contracts, are intended by all parties to be assigned to, and are in fact assigned to, third parties for valuable consideration, are not "book-debts" within the meaning of the Assignment of Book Debts Act; and, if they are not book-debts within the meaning of the Act, then filing in the County Court office does not assist them; and, as there is no evidence that the defendant has had actual notice of the assignment to the plaintiff of the book-debts, it is not bound thereby.

But there is another ground on which I think the plaintiff must fail. The evidence shews that the plaintiff, when it was

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selling its furniture to Fagel, knew that Fagel, to finance his business, was using this York plan; in other words, that he was making conditional sales and financing his business by assigning these conditional sale contracts to the defendant and borrowing money from the defendant thereon.

In 21 Corpus Juris, p. 1172, it is stated that where one person allows another to appear as the owner of or as having the full power of disposition over property, and innocent third persons are thus led into dealings with such apparent owner or person having such apparent power of disposition, they will be protected. In other words, where one person has surrendered the possession of goods to another, and has exhibited to the world the person who has possession as one having the power of disposition over property, he will not be heard as against an honest buyer who has acted on the confidence so reposed. In such cases the rights of such third persons do not depend on the actual title or authority of the party with whom they deal directly, but are derived from the act of the other person, which precludes him from disputing, as against him, the existence of the title or power which, through negligence or mistaken confidence, or in any other way, he caused or allowed to appear to be vested in the party making the conveyance. There are many cases there cited supporting that statement. Whether you call it estoppel by conduct or by acquiescence or equitable estoppel, or whatever it may be, I think it precludes the plaintiff from recovering in this action.

Yesterday I came across a statement of Lord Chancellor Cairns which I thought particularly appropriate here. It is found in *Evans v. Smallcombe* (1868), L.R. 3 H.L. 249, at p. 256. The decision in that case is in no sense applicable here, because the facts are entirely different, and I do not cite it for that purpose; but this dictum of Lord Cairns, I think, is particularly applicable. He says:—

“I desire to add one word with regard to a phrase which I think, in matters of this kind, is sometimes somewhat misapplied, namely, the phrase ‘acquiescence.’ If by ‘acquiescence’ is meant a course of conduct which amounts to active and intelligent consent, I think it very likely that many of these shareholders”—he is dealing with a bank case—“could not be held to have actively or intelligently consented to what was going on. But what I think is the real question to be looked at in any case of this kind is this:—Had the shareholders notice of the way in which the affairs of the company were being conducted, and its property was being managed, and of the rights and interests which were being created with regard to the stock of the company? If they

had that notice, and if they were content not to oppose those acts which they knew were every day being done, then I think they are debarred in point of equity from coming forward at a later period for the purpose of undoing the rights and releases which had been created and given."

In this case the plaintiff knew that Fagel was selling every day under the conditional sales system and knew that he was assigning these sale contracts to the defendant and borrowing money thereon. It cannot now come forward and undo the rights so created.

On these two grounds—first of all, because I think the debt in question created by the sale to Finegan was, under the circumstances, not a book-debt within the meaning of the Assignment of Book Debts Act, and, secondly, that, even if it were, the plaintiff is now precluded from recovering, for the reasons given — the action will be dismissed with costs.

The plaintiff company appealed from the judgment of the County Court.

March 27. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

E. N. Johnson, for the appellant company, argued that the accounts were "book-debts" within the meaning of the Assignment of Book Debts Act: *Shipley v. Marshall* (1863), 14 C.B.N.S. 566; *Dawson v. Isle*, [1906] 1 Ch. 633; *Re Wiarton Lumber Co., Ltd.* (1924), 26 O.W.N. 21; *In re Stevens*, [1888] W.N. 110. The assignment to the appellant company attached at once, and there was nothing left for Fagel to assign. Registration gave the defendant company a superior position. The appellant company had no such knowledge of the transactions between the defendant company and Fagel as to amount to an estoppel.

B. N. Davis, K.C., for the defendant company, respondent, contended that the appellant company took subject to the respondent company's contract with Fagel of the 29th December, 1926. Registration did not confer any greater right on the appellant company as against the respondent company than it had before. At common law the respondent company was entitled to succeed. The appellant company's knowledge of the transactions between the respondent company and Fagel amounted to an estoppel: *Re Tatham* (1901), 2 O.L.R. 343; *Liquid Carbonic Co. Ltd. v. Rountree* (1923), 54 O.L.R. 75; *Quebec Bank v. Taggart* (1896), 27 O.R. 162; *Fraser v. Imperial Bank of Canada* (1912), 47 Can. S.C.R. 313, at p. 379.

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June 30. LATCHFORD, C. J.:—The facts in this case are not in dispute, and are fully and accurately set forth in the judgment appealed from of Denton, Co. C.J., of the 3rd January, 1930.

The contest arose out of assignments made by one Fagel, a retail furniture dealer—that to the plaintiff company of his book-debts, etc., dated the 5th August, 1927, and that to the defendant company on the 29th December, 1926.

I agree in the conclusion arrived at by the learned trial Judge that the action fails. The appeal should, I think, be dismissed with costs, if only on the simple ground that it was never in the contemplation of the parties to the August assignment that the conditional sales agreements, covered, as the parties knew, by the previous contract between Fagel and the defendant, should be affected by the subsequent assignment of Fagel's book-debts.

ORDE, J. A.:—The facts are stated sufficiently in the judgment of the learned County Court Judge, and so need not be repeated.

The plaintiff is claiming by virtue of a general assignment to it by one Fagel of "all debts, accounts, claims, moneys, and choses in action which now are or which may at any time hereafter be due or owing to or owned by the undersigned (i.e. Fagel), and also all contracts, bills, notes, and other documents now held or owned or which may be hereafter taken, held, or owned by the undersigned, or any one on behalf of the undersigned, in respect of the said debts, accounts, claims, moneys, and choses in action, or any part thereof." This assignment was taken "as a general and continuing collateral security for payment of all existing and future indebtedness and liability" of Fagel to the plaintiff.

This assignment was duly registered as required by the Assignment of Book Debts Act, which is now R.S.O. 1927, ch. 166, and some stress was laid upon this registration as if it in some way placed the plaintiff in a position superior to that of the defendant. This is, of course, not the effect of the Act. The Act does not either expressly or impliedly confer any greater right upon an assignee of a chose in action than he had before. All it does is to make a general assignment of book-debts void, as against creditors and subsequent purchasers or mortgagees in good faith and for value, unless registered. By registration the plaintiff here has preserved whatever rights it acquired by virtue of the assignment and no more. In other words, its rights are to be determined exactly as if the Act had never been passed.

What are those rights? The assignment as such transferred to the plaintiff no rights in the choses in action which were recog-

nised at common law. Its efficacy was and still is based solely upon principles of equity, with the additional statutory right given to the assignee to bring action in his own name, instead of that of the assignor, against the debtor, upon giving notice to the latter: Conveyancing and Law of Property Act, R.S.O. 1927, ch. 137, sec. 49. The assignee takes subject to all the equities. He cannot acquire higher rights against the debtor than those of the assignor himself, and his rights may be defeated or impaired by the intervention of some other assignee who, by giving notice to the debtor of his assignment, or for some other reason, acquires a superior equitable title.

Let us see how these principles are applicable to the present transaction. Fagel is a dealer in furniture. If he were to make an absolute sale of some article to a customer upon credit, the resulting debt would clearly come within the assignment to the plaintiff. If, in spite of that assignment, Fagel were to assign the debt to some other person, and that other were to give notice thereof to the debtor, the equity of the second assignee would be superior to that of the plaintiff.

The alleged debts or choses in action in this present case are not of that simple character. Fagel, as the owner of the furniture he was dealing in, was free to sell it upon any terms he chose, either by a simple sale for cash or upon credit, or by means of more complicated contracts, such as conditional sales, whereby the title to the goods remained in him and the purchaser could get no title until payment in full. Still retaining the title in the goods, there was nothing to prevent him from transferring that title with the purchaser's obligations in respect thereof to the defendant, either for cash, or in discharge of previous advances made to him, or upon credit. Had he sold or transferred the conditional sale contracts for cash or in satisfaction of previous advances, the plaintiff could have no greater rights than if the plaintiff had sold direct to the customer for cash, and had retained the cash or used it to discharge his indebtedness to the defendant. If the sale or transfer to the defendant were upon credit, so that the defendant took over all the benefits and assumed all the obligations of Fagel under the conditional sale contract, then there would be, of course, a simple book-debt or chose in action owing by the defendant to Fagel, which the plaintiff, after giving due notice in compliance with the statute, could enforce against the defendant.

That is not what the plaintiff seeks in this action. The whole cause of action set up by the statement of claim and the prayer for relief are founded upon the supposed right by virtue of the assignment to compel the defendant to account to the plaintiff in respect

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of any debts to Fagel which were assigned by him to the defendant, and for all moneys received by the defendant in respect thereof. It is not alleged or attempted to be proved that the plaintiff ever attempted to place its equity upon a higher footing than that of the defendant by giving notice to Fagel's debtors. Having regard to the nature of the debts themselves and the terms of the conditional sales agreements by which they were incurred, how effective any such notice would have been may be open to question, for it is clear that an assignee of money payable under a contract takes the assignment subject to the conditions of the contract: *Government of Newfoundland v. Newfoundland Railway Co.* (1888), 13 App. Cas. 199; *Tooth v. Hallett* (1869), L.R. 4 Ch. 242. See also the judgment of this Court in *Interior Trust Co. v. Essex Border Utilities Commission* (1928), 62 O.L.R. 551.

Had the plaintiff claimed to recover moneys due by the defendant to Fagel in respect of their dealings with each other—and, as I have said, the general assignment by Fagel to the plaintiff embraced all such choses in action—different considerations would have arisen and the evidence would have been directed to that issue.

It is to be observed that the form of conditional sale contract used by Fagel contains an express provision that the contract may be assigned to the defendant company. This right reserved by Fagel as a term of the contract was an equity to which the plaintiff's assignment was subject, upon the principle exemplified by the cases I have just mentioned. When Fagel exercised that right, there was in fact, as a result of the very bargain between himself and his customer, the purchaser, a complete novation whereby the purchaser became indebted to the defendant, and there was nothing left upon which the plaintiff's assignment could operate, so far as any debt due by the purchaser to Fagel was concerned. Having regard to the nature of each contract, to the provision therein just mentioned, and to the fact that Fagel specifically assigned and transferred to the defendant for value all his interest therein and in the moneys payable thereunder, and also in the goods conditionally sold thereby, the defendant became absolutely entitled as against the plaintiff to the moneys payable by the customer; and, if there were any equities arising out of the transaction at all, the equity of the defendant was higher than that of the plaintiff. There was no evidence that the defendant had any notice of the existence of the plaintiff's assignment, which might perhaps have affected the defendant's equities, and there is nothing in the Assignment of Book Debts Act to make mere registration notice to the world at large.

For these reasons, I think the plaintiff fails and its appeal must be dismissed.

RIDDELL, MASTEN, and FISHER, J.J.A., agreed that the appeal should be dismissed with costs.

Appeal dismissed with costs.

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[APPELLATE DIVISION.]

WESTLAKE V. MARTIN.

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June 5.

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June 30.

Bankruptcy—Conversion by Trustee of Goods of Debtor and Book-debts Covered by Chattel Mortgage—Assignment of Book Debts Act, 1923, 13 & 14 Geo. V. ch. 29, secs. 2 (b), 3, 4—Whether Complied with—Invalidity of Instrument quoad Book-debts—Business Carried on by Trustee and Debts Incurred—Bankruptcy Act, R.S.C. 1927, ch. 11, secs. 5 (2), 34 (2), (3), 43—Damages—Res Judicata—Floating Charge—Crystallization.

K., on the 8th June, 1923, made a chattel mortgage to the plaintiffs on his stock-in-trade, and by the same instrument purported to assign to the plaintiffs, as additional security, all present and future book-debts arising out of or connected with K.'s business. The affidavit of *bona fides* described the instrument as a bill of sale by way of mortgage and asserted that it was not taken for the purpose of protecting "the goods and chattels" mentioned therein against the creditors of the mortgagors, etc.:—

Held, that the instrument did not comply with the Assignment of Book Debts Act, 13 & 14 Geo. V. ch. 29, which was in force when the instrument was executed, and was invalid as an assignment, the requirement of the Act being that the affidavit shall state that the assignment is "not for the purpose of holding, or enabling the assignee or assignees to hold, the said debts or accounts against the creditors of the assignor:" para (b) of sec. 2.

The validity of the instrument was attacked by the trustee in bankruptcy of K.'s estate, but only in its character of a chattel mortgage. By an order of the Registrar in Bankruptcy (affirmed on appeal) the chattel mortgage was declared to be a good and valid chattel mortgage as against the trustee: *In re Kerr* (1926), 31 O.W.N. 47, 7 C.B.R. 605, 615:—

Held, that this order in no way affected the validity or invalidity of the instrument in so far as it dealt with book-debts, and the question of validity or invalidity was not *res judicata*.

The petition for a receiving order was filed on the 19th May, 1926.

While it was pending an order was made on the 10th June, 1926, appointing the defendant interim receiver with power to take possession, dispose of perishable goods, and control receipts and disbursements, but not otherwise to unduly interfere with the carrying on of the business of the debtor in the ordinary way. On the 18th June, 1926, a receiving order was made, and the defendant was appointed custodian of the debtor's estate; he was later appointed trustee in bankruptcy. Between the 18th June and the 14th July, 1926, the defendant sold some of the mortgaged chattels:—

1929-30. *Held*, that the defendant exceeded his authority in the way in which he disposed of the chattels, and must account in respect thereof.

WESTLAKE *v.* MARTIN. The mortgage was in effect a floating charge upon the stock-in-trade, and the mortgagor could give title to what he sold in the ordinary course of business free from the charge created by the mortgage, and the proceeds of any such sale were his own.

The floating charge became crystallized on the 10th June, when the interim receiving order was made—when the pending bankruptcy application results in a declaration of bankruptcy, then, as against the mortgagee under a floating charge, the effect of the receiving order as an interference with the mortgagor's business must relate back to the appointment of the interim receiver—and the defendant must account for his dealings with the goods as from the 10th June.

Per MASTER, J.A.:—Unless otherwise agreed, a floating charge retains its floating character until a receiver is appointed or a winding-up commences or the company stops business. Each case depends upon the special provisions contained in the document creating the security and on the particular circumstances; but in the case at bar there is no doubt that the security had become crystallized on the 10th June.

AN action by the executors of Henry Westlake, deceased, against Norman L. Martin, the trustee in bankruptcy of the property of George T. Kerr, in his (Martin's) personal as well as his official capacity, to recover damages for the defendant's wrongful acts in respect of chattels and book-debts which had been mortgaged and assigned to Henry Westlake in 1923.

May 18, 1929. The action was tried before LOGIE, J., without a jury, at London.

W. B. Henderson, for the plaintiffs.

E. A. Harris, for the defendant.

June 5, 1929. LOGIE, J.:—The plaintiffs are the executors of Henry Westlake, deceased, who held a chattel mortgage, dated the 8th August, 1923, on the goods and chattels of George T. Kerr, who carried on a general store at Sombra, in the county of Lambton.

George T. Kerr became a bankrupt on or about the 10th June, 1926, and the defendant was appointed interim receiver. On the 18th June, 1926, a receiving order in bankruptcy was made against Kerr, and by the same order the defendant was appointed custodian of his estate; and subsequently on the 8th July, 1926, the defendant was appointed, by the creditors, trustee for the administration in bankruptcy of Kerr's estate.

The chattel mortgage above mentioned contains an assignment to the plaintiffs of all book-debts, present and future, in connection with the business then carried on by Kerr.

On the date of the receiving order, there was due to the plaintiffs on the chattel mortgage, \$13,566.98, and, after sale of

the balance of the goods of the bankrupt by the plaintiffs, there was a large deficit.

The defendant entered into possession of the goods, chattels, book-debts and book-accounts, covered by the chattel mortgage, and proceeded to carry on the business of Kerr, to dispose of the chattels, and collect the book-debts, and so continued until the 19th July.

On or about the 3rd July, the defendant was notified that the plaintiffs, as executors of Westlake, held a chattel mortgage, and on the 5th July the defendant was served with notice that anything he received from sales of the mortgaged property was to be held by him as trustee for the mortgagees, and further that it was the plaintiffs' intention to proceed and sell under the mortgage.

The defendant thereupon, in bankruptcy, proceeded to test the validity of the chattel mortgage in question, and it was finally declared valid and binding, and the defendant now admits that this is so.

The defendant, on the 10th June, 1926, by the order of the Assistant Registrar, was directed to take immediate possession of the property of the debtor and summarily dispose of any perishable goods, as follows: "And under the direction of the Court to carry on the business of the debtor for all conservatory purposes."

A clause originally inserted in the draft order, "But said interim receiver shall not incur any liabilities in connection therewith," was struck out of the order, and the order went on to provide as follows:—

"And to control the receipts and disbursements of the business of the said debtor, but not otherwise to unduly interfere with the carrying on of the business of the debtor in the ordinary way."

No other order of the Court permitting the receiver or custodian or the trustee to carry on the business of the bankrupt was obtained by the defendant, who, as his agent McGregor said in the box, carried on the business in the ordinary way, replacing perishable goods with other perishable goods and depositing the money to the credit of the defendant in the bank at Sombra.

The defendant, after he entered into possession, furthermore gave credit to certain customers of Kerr to the amount of \$495.30.

The chattel mortgage, which contained the assignment of book-debts, did not comply with the Assignment of Book Debts Act, 1923, 13 & 14 Geo. V. ch. 29 (Ont.), assented to on the 8th May, 1923, and, in my opinion, therefore, all book-debts, etc., which were incurred prior to the receiving order, by virtue of the Bankruptcy Act, 1919, 9 & 10 Geo. V. ch. 36, sec. 6. and the amending Act of 1923, 13 & 14 Geo. V. ch. 31, sec. 6 (Dom.), passed to and

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became vested in the trustee for the creditors, but the book-debts which the trustee subsequently allowed to be incurred, representing as they do part of the stock-in-trade of the debtor, must be returned to the mortgagees.

Failing an order allowing the custodian or trustee to carry on the business of the debtor, the goods were the goods of the plaintiffs, and, if converted to the use of the defendant and sold, the proceeds should have been held for them. Certain substitutions were made by the custodian and stock purchased in some small quantities, of which the plaintiffs got the benefit when they entered into possession. The defendant should get credit for the proceeds of these substituted goods on the reference.

There will be a reference to the Master to fix the damages which the plaintiffs sustained by reason of the sale of the goods and chattels of the plaintiffs from the 18th June to the 14th July, 1926, on the above basis, and, in addition, the plaintiffs will have judgment for the amount of the book-debts which the defendant allowed to be incurred after the receiving order. If there is any dispute as to this amount, the Master will fix it.

Costs and further directions reserved.

April 25. The appeal and cross-appeal came on for hearing before LATCHFORD, C. J., MASTEN, ORDE, and FISHER, JJ.A.

The defendant's appeal was abandoned, and argument proceeded on the plaintiffs' cross-appeal.

Henderson, for the plaintiffs, cross-appellants, argued that the defendant should account to the plaintiffs for the book-debts because the validity of the assignment had been judicially determined in the plaintiffs' favour, between the parties to the present action, by the order of the Registrar in Bankruptcy, and on appeal by the order of Fisher, J., dated the 25th September, 1926. The plaintiffs were entitled to recover from the defendant damages for the goods and chattels sold from the date of the interim receivership (the 10th June, 1926) to the 14th July, 1926, instead of from the 18th June, 1926, to the 14th July, 1926. Reference to *In re Pollitt Ex p. Minor*, [1893] 1 Q.B. 455; *Re Cotton, Ex p. Cooke* (1913), 108 L.T.R. 310; *Re Guaranteed Batteries Ltd.* (1923), 53 O. L. R. 45.

E. N. Johnson, for the defendant, respondent to the cross-appeal, contended that the order of Fisher, J., did not deal with the question at issue here, but merely declared the mortgage valid as a mortgage of chattels. The assignment of the book-debts under the chattel mortgage is not sufficient under the Assignment of Book Debts Act, R.S.O. 1927, ch. 166, sec. 2 (b),

as the affidavit of *bona fides* does not contain the words "to hold the said debts or accounts against the creditors of the assignor." The defendant had the right to act as he did in regard to the goods and chattels of the debtor between the 10th and the 18th June, 1926.

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June 30. FISHER, J.A.:—Appeal by the defendant and cross-appeal by the plaintiffs from the judgment of Mr. Justice Logie, in an action by the plaintiffs against the defendant personally and as trustee in bankruptcy of the insolvent estate of George T. Kerr.

The plaintiffs' action is to recover the books of account of the insolvent, for damages, and for an accounting of the dealings of the defendant in regard to the goods and chattels and book-debts covered by their mortgage.

As the learned trial Judge in his reasons has set out all the relevant facts, I shall only refer to the following. Kerr, on the 8th June, 1923, gave a chattel mortgage on his stock-in-trade, chattels, and book-debts, for \$13,176.40. In June, 1926, he got into financial difficulties, and the defendant was appointed interim receiver on Thursday the 10th June, 1926, and through his agent, one McGregor, took possession on that day. On the 18th June, 1926, a receiving order was made, declaring Kerr a bankrupt, and the defendant was appointed custodian, and on the 8th July, 1926, trustee, by the creditors, and continued in possession until the 14th July, 1926, when he yielded up possession to the plaintiffs. The order appointing the defendant as receiver contains, apart from the usual undertaking as to damages, authority to "take possession of the property," to "summarily dispose of any perishable goods," "to control the receipts and disbursements of the business of the debtor," and an undertaking "not unduly to interfere with the carrying on of the business of the debtor in the ordinary way."

The only perishable goods McGregor found upon taking possession consisted of "fresh and cured meats." By way of additional security, the mortgage contains an assignment of "all book-debts, money-demands, mortgages, bills, notes, cheques, judgments, and choses in action, both present and future," etc., etc.

The learned trial Judge found that the assignment of book-debts did not comply with the Act, but that the plaintiffs were entitled to damages for the goods and chattels sold by the defendant between the 18th June, 1926, and the 14th July, 1926, and the right to recover the amount of any book-debts which the defendant allowed to be accrued in conducting the business as receiver and trustee, and directed a reference to the Local Master to inquire

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and report the amount of damages which the plaintiffs were entitled to recover; and, in assessing damages, the Master was directed to credit the defendant for goods and chattels substituted by the defendant for goods and chattels covered by the plaintiffs' mortgage and sold by the defendant. •

In August, 1926, the trustee launched a motion, returnable before the Registrar in Bankruptcy, to have the mortgage declared void as against creditors, upon several grounds, all of which were technical, and are specifically referred to in his judgment in *In re Kerr* (1926), 7 C.B.R. 605. The Registrar dismissed the motion, and an appeal was, on the 20th September, 1926, dismissed. See 31 O.W.N. 47, 7 C.B.R. at p. 615.

On the argument before this Court the defendant abandoned his appeal and the plaintiffs asked permission to plead that any attack now made on the validity of the assignment of book-debts was *res judicata*. The attack on the validity of the chattel mortgage was based solely on the following points: that the affidavits of *bona fides* and of the execution of the mortgage were defective; that the mortgage did not disclose the individual interest of the two mortgagors; and that a mortgage cannot be made by two mortgagors jointly or as tenants in common; so it is quite clear that the question of the validity of the assignment of the book-debts was not raised, litigated, or determined by the Court, and therefore the trustee is not precluded from raising the question in the present action, and the plea of *res judicata* fails. It seems unnecessary to make reference to the many authorities establishing the doctrine of *res judicata* as applying only where the cause of action and the issues sought to be set up are identical with the cause and the action already disposed of in a former action: but see *McIntosh v. Parent* (1924), 55 O.L.R. 552.

Three questions arise for determination:—

- (1) The validity of the assignment of the book-debts;
- (2) The time from which the plaintiffs are entitled to have their damages assessed; and
- (3) The right of the plaintiffs to recover the book-debts incurred after the receiving order was made declaring the debtor a bankrupt.

By secs. 3 and 4 of the Act respecting the Assignment of Book Debts, 13 & 14 Geo. V. ch. 29, assented to on the 8th May, 1923, every assignment shall be absolutely null and void as against the creditors of the assignor, unless it is (a) in writing, and (b) is accompanied by an affidavit of an attesting witness, and a further affidavit by the assignee that "the assignment is *bonâ fide* and for good consideration, and not for the purpose of

holding, or enabling the assignee or assignees to hold, the said *debts or accounts* against the creditors of the assignor, and (c) is registered, within 21 days of the execution, in the office of the clerk of the County Court of the County in which the person making the assignment resides.

It was argued by counsel for the plaintiffs that the affidavit of execution by the witnesses to the mortgage and the affidavit of *bonâ fides* by the mortgagees answered the requirements of paras. (a) and (b) of sec. 3, but, if para. 2 of the affidavit of *bonâ fides* is examined, it will be seen that it refers to "protecting the goods and chattels" and omits the words "to hold the said *debts or accounts* against the creditors of the assignor."

The Act does not prescribe any particular form of an assignment, and it is quite conceivable that a valid assignment of book-debts may be inserted in a chattel mortgage; but, if so included, the requirements of paras. (a) and (b) must be strictly complied with.

But it is to be noted that the Act deals exclusively with *debts or accounts*, as distinguished from *goods and chattels*, covered by a chattel mortgage. Had the affidavit of *bonâ fides* included in it, after the words "goods and chattels," the words "debts or accounts," it is quite possible that there would have been a substantial compliance with the Act; and, although there are no reported cases on the point, my opinion is that the omission of these words in the affidavit of *bonâ fides* operates as a fatal objection to the validity of the assignment of the book-debts.

The aim and object of the Act was to give publicity and reasonable information to creditors, and the requirement was not meant to be satisfied by having something purporting to be an assignment of book-debts, within the meaning of the Act, inserted and hidden away in the usual long form of a chattel mortgage, without the slightest reference in the affidavit of *bonâ fides* to the fact that the mortgage included an assignment of book-debts or accounts—and then have the document registered in the clerk's office only as a chattel mortgage.

The remaining questions relate to the rights of the plaintiffs, the mortgagees, and the conduct of the defendant, as receiver, custodian, and trustee; and I venture to suggest that, had the defendant exercised reasonable judgment and ordinary care after possession was taken, the present difficulties would not have arisen.

It seems to me that the defendant's conduct throughout indicates an undue haste to obtain possession and to retain it as long as he could, and—during that period and thereafter—to involve the estate in needless expense and litigation. The debtor was

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present when the receiver took possession, and it is inconceivable that the receiver was not told at that time by the debtor that the plaintiffs held a chattel mortgage against all the stock-in-trade; but, if the debtor did not tell, there is ample evidence to prove that the defendant, through his agent McGregor, was notified of this mortgage within one week thereafter, and, without the slightest regard to the terms of the order and the rights of the mortgagees, he proceeded to sell goods, purchased new goods, extended credit, and collected book-accounts; and, to use McGregor's own words, to carry on the business generally. See p. 42, line 47:—

"Q. Did you limit yourself to perishable goods or did you carry on the business generally? A. Carried on the business generally."

And he further admits having sold the perishable goods described in the chattel mortgage and repurchased other perishable goods; that the sales of the stock amount to \$1,662.26; that the new goods purchased cost \$1,240.83; that the extent of new credit amounted to \$493.30; and that he collected on book-accounts due at the time of the receiving order \$514.98. It will therefore be seen that the defendant as receiver disregarded all the terms of the order under which he was appointed.

I also wish to point out—although it has no direct bearing on the issues now before the Court—that the defendant should never have been appointed a receiver on the material filed, because Kerr was regarded as a highly respectable merchant of long standing at Sombra, the mortgage had been in force since 1923 and regularly renewed thereafter, and all the interest had been paid, and I also observe that, in the affidavit supporting the defendant's application to be appointed receiver, the information and belief of the deponent were not disclosed, and there was not set out in the affidavit the slightest suggestion of Kerr's dishonesty, or that he was fraudulently disposing of or concealing his property. Under the authorities—I mention only one, *Re Hyslop* (1925), 29 O.W.N. 136, 7 C.B.R. 101—had an application been made, the order would have been set aside.

But the defendant, having been appointed receiver and subsequently custodian and trustee, his duties as such are clearly defined by the Act. Under sec. 5 (2) of the Bankruptcy Act, R.S.C. 1927, ch. 11, an *interim receiver* may, under the direction of the Court, summarily dispose of perishable goods and carry on the business of the debtor for conservatory purposes. Under sec. 34 (2), a *custodian* has the same powers as a receiver, and by subsec. 3 he shall remain in possession until a trustee is appointed

by the creditors; and after his appointment as trustee he is governed by the powers given to him by sec. 43.

The appointment of a receiver does not effect a transfer of the debtor's property; he has no estate vested in him, the object of his appointment being simply the protection of the estate: see *In re Berry, Duffield v. Williams*, [1896] 1 Ch. 939, 944; and, unless it is for protection or preservation of the property, a receiver has no right to sell property of the debtor. See *Re Wells and Croft* (1895), 12 L.T.R. 359.

The plaintiffs were secured creditors; and, if the defendant did not know on the 10th June, or shortly thereafter, he positively knew on the 18th June, and on the 3rd and 5th July, 1926, from letters received from the plaintiffs' solicitor, that the plaintiffs intended to assert all their rights to possession of the property covered by the mortgage; and, notwithstanding all this, the defendant persisted in carrying on the business in a general way and refused to give possession until the 14th July.

Apart from the book-accounts owing the insolvent estate at the date of the receiving order, the only interest the defendant had in the estate was in the equity, and on and after the 18th June, 1926, the date the defendant completed stock-taking, he knew that the equity was valueless, as the statement shewed that there were not sufficient assets by thousands of dollars to satisfy the amount due on the mortgage.

I also think that effect must be given to the contention of counsel for the plaintiffs that, as the defendant's illegal acts commenced from and after the 10th June, 1926, the plaintiffs are entitled to have any damages they can shew that they suffered assessed from that date, instead of from the 18th June, 1926, as found by the trial Judge.

For the Master's guidance on the reference, it should be stated that the plaintiffs' property is not chargeable with any costs of administration incurred by the defendant, excepting the costs of and incidental to the selling of perishable goods on hand when he took possession, and any costs of and incidental to the preservation of the assets of the estate during the period he was acting as interim receiver and custodian.

Any costs of and incidental to the collection of the book-debts due at the date of the receiving order must be paid out of the book-debts collected, and also, if there are any losses sustained in the collection of the new book-debts, that they also are chargeable to the defendant, as are the costs of the litigation instituted by him in the administration of the estate, in which he failed. For what-

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over sum the Master may find the plaintiffs entitled the judgment will be entered against the defendant personally and as trustee.

With these variations, the judgment of the trial Judge must stand, and the cross-appeal be dismissed without costs. The defendant's appeal will be dismissed with costs payable by the defendant personally.

LATCHFORD, C.J., agreed with FISHER, J.A.

ORDE, J.A.:—An appeal in this action was first launched by the defendant, but was afterwards abandoned. The matter comes before us upon the cross-appeal of the plaintiffs.

The chattel mortgage in question purports to assign to the mortgagees, by way of additional security, all present and future "book-debts, claims, money-demands, mortgages, bills, notes, cheques, judgments, and choses in action" arising out of or connected with the mortgagor's business.

The affidavit of *bona fides* upon this instrument describes it as a "bill of sale by way of mortgage" and asserts that it was not taken for the purpose of protecting "the goods and chattels" mentioned therein against the creditors of the mortgagors, etc.

The Assignment of Book Debts Act, 13 & 14 Geo. V. ch. 29, now R.S.O. 1927, ch. 166, was in force when the chattel mortgage and assignment of book-debts was executed, so that, unless valid according to that Act, it would be void as against the creditors of the assignors under sec. 2 thereof.

That it does not comply with the Act seems clear. Book-debts and other choses in action are not "goods and chattels." The Bills of Sale and Chattel Mortgage Act, R.S.O. 1927, ch. 164, deals only with that type of personalty which is of a tangible nature which can be delivered from hand to hand, that is, with goods and chattels. An affidavit that the instrument is "not for the purpose of protecting the goods and chattels mentioned therein against the creditors" of the mortgagors cannot possibly be construed as complying with the statutory requirements in the Assignment of Book Debts Act, that the affidavit shall state that the assignment is "not for the purpose of holding, or enabling the assignee or assignees to hold, the said debts or accounts against the creditors of the assignor:" para. (b) of sec. 2.

The sole ground upon which the plaintiffs attack the judgment appealed from on this branch is that the matter is *res adjudicata*. The validity of the instrument was attacked by the trustee, but apparently only in its character of a chattel mortgage. The order of the Registrar in Bankruptcy of the 25th August, 1926, declares

that "the chattel mortgage dated . . . be and the same is hereby declared to be a good and valid chattel mortgage as against the trustee." An appeal from that order was dismissed by my brother Fisher on the 20th September, 1926, and it is clear from his reasons for his judgment that the fact that the instrument also comprised an assignment of book-debts was not dealt with at all: see *Re Kerr*, 31 O.W.N. 47. The mortgage was attacked as a chattel mortgage on the ground that it had not complied with certain provisions of the Bills of Sale and Chattel Mortgage Act. That attack failed, and the only result of the judgment was that, as a mortgage of the chattels, it was declared to be valid. The judgment in no way affects the validity or invalidity of the instrument as it affects the book-debts. That question is not *res adjudicata*, and the appeal on that ground must fail.

The other branch of the appeal involves the question as to when the mortgagees' rights in respect of the defendant's dealing with the mortgaged goods attached. The petition for a receiving order was filed on the 19th May, 1926. While the application was pending, an order was made on the 10th June, 1926, appointing the defendant an interim receiver, with power to take possession, dispose of perishable goods, and to control receipts and disbursements, but not otherwise to unduly interfere with the carrying on of the business of the debtor in the ordinary way. On the 18th June, 1926, a receiving order was made, and the defendant was appointed custodian of the debtor's estate. The defendant was later appointed the trustee in bankruptcy.

The learned trial Judge has rightly held that the defendant exceeded his authority in the way in which he disposed of the mortgaged goods, and he has held that the defendant must account in respect thereof as from the 18th June, 1926. If the mortgagor had continued to carry on his business himself up to the making of the receiving order, which declared him bankrupt, the proceeds of any sales during that period would doubtless belong to the trustee in bankruptcy. The mortgage was in effect a floating charge upon the stock-in-trade, and the mortgagor could give title to what he sold in the ordinary course of business free from the charge created by the mortgage, and the proceeds of any such sale were his own.

When did the floating charge here become crystallized—at the date of the appointment of the interim receiver or only at the date of the receiving order? The object of a floating charge is to enable the mortgagor to dispose of the mortgaged goods in the ordinary course of business, and to give a clear title thereto to the purchaser. The charge becomes crystallized when the mortgagor

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ceases to do business, or when a receiving order is made. I am speaking broadly, because there may always be something in the instrument modifying or enlarging the mortgagor's rights in this regard. Does the appointment of an interim receiver constitute such an interference with the mortgagor's business as to crystallize the security? I am of the opinion that it does, though I have not found any authority upon the precise point. Of course, if in the result the receiving order is refused, then the receiver must account to the debtor for anything that has come to his hands; but I am of the opinion that, when the pending bankruptcy application results in a declaration of bankruptcy, then, as against the mortgagee under a floating charge, the effect of the receiving order as an interference with the mortgagor's business must relate back to the appointment of the interim receiver. If this were not so, the consequences to the mortgagee might in many cases be disastrous. The interim receiver might so deal with the assets by converting them into cash as to wipe out the mortgagee's security, if the proceeds in such case are to go to the general body of creditors and not to the mortgagee.

For this reason, as well as upon the ground that the defendant as interim receiver exceeded his powers when disposing of the mortgaged goods, I agree that the judgment of the learned trial Judge should be varied by requiring the defendant to account for his dealings with the goods in question as from the 10th June, 1926, in the way pointed out by my brother Fisher. And I agree with his disposition of the costs.

MASTEN, J.A.:—I agree with the conclusions reached by my brothers Orde and Fisher, and desire only to add an observation on the question of crystallization of a floating charge as discussed in the judgment of my brother Orde. I agree with his conclusion that, having regard to the provisions of the chattel mortgage in question and the attendant circumstances as detailed in the judgments of my brothers, the floating charge did become crystallized on the appointment of the interim receiver. That order put an end to the power of the mortgagor to continue business in the ordinary way, and I have found no provision in the mortgage which in that event prevents the crystallization of the charge.

In Stibel's Company Law, 2nd ed., p. 537, it is said:—

"It follows from the very nature of a floating security that the security becomes fixed as and from the date when the company ceases to carry on business, otherwise there would be outgoings continuing for the purpose of the winding-up, but no incomings; and the security of the debenture-holders would gradually dis-

appear; and so, even though the debenture-holders may not be able to sue on their covenant, if the time for payment mentioned in the debentures has not arrived, they are entitled on the company stopping business to a declaration that they are entitled to a charge for the full amount of their debentures, with interest, and to an account on that footing."

The law so stated appears to be fully supported and borne out by the judgment of the Court of Appeal in the case of *Wallace v. Universal Automatic Machines Co.*, [1894] 2 Ch. 547. The head-note in that case reads as follows:—

"Where a debenture, issued by a company by way of floating security, contains a covenant for payment of the principal money on a specified day, though without any stipulation making the money immediately payable in the event of a winding-up, the occurrence of a winding-up before the specified day renders the money immediately payable, and entitles the debenture-holder at once to realise his security for the full amount of principal, interest and costs."

The case was argued by Eve (now Mr. Justice Eve) for the plaintiff, and was decided in the Court of Appeal by Lord Justice Lindley, Lord Justice Lopes concurring, and Lord Justice Kay. In the course of his judgment, Lord Justice Lindley says:—

"The undertaking, on the security of which the money was borrowed, has in fact come to an end by the winding-up; and this circumstance entitles the debenture-holders to realise their security at once. This point was determined in *Hodson v. Tea Co.* (1880), 14 Ch.D. 859, which was itself based on the earlier case of *In re Panama etc. Co.* (1870), L.R. 5 Ch. 318."

With this statement the view expressed in *Palmer's Company Precedents*, 13th ed., Part III., at p. 70, agrees, where it is said: "Unless otherwise agreed, a floating charge retains its floating character until a receiver is appointed or a winding-up commences . . . or the company stops business."

Every case must depend upon the special provisions contained in the document creating the security and on the particular circumstances; but in the present case there can be no doubt that the security had become crystallized on the 10th June.

Judgment below varied.

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[APPELLATE DIVISION.]

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CLARKSON V. ROBERTS.

June 30.

Division Courts — Jurisdiction — Amount Claimed—Abandonment of Excess—Ascertainment of Amount—Division Courts Act, R.S.O. 1927, ch. 95, sec. 54.

In a Division Court action the plaintiff's claim was to recover from the defendant as maker of a promissory note, of which the plaintiff was the holder in due course, the sum of \$400. The particulars given shewed the note to be for \$750, credited thereon \$87.50, the proceeds of re-sale of a musical instrument for the price of which the note was given by the defendant, and \$262.50, "amount hereby abandoned," leaving the claim at \$400:—

Held, that, as the amount claimed did not exceed \$400, the plaintiff abandoned the excess over \$400 of an amount which did not exceed \$800, and this amount was ascertained by producing the document and proving the signature of the defendant, the claim was brought within sec. 54 of the Division Courts Act; and the jurisdiction of the Division Court was affirmed.

It was of no importance that other evidence must be adduced to prove the title of the plaintiff.

AN appeal by the plaintiff from the judgment of the Sixth Division Court of the County of Welland dismissing an action to recover the amount of a promissory note, upon the ground that the Division Court had no jurisdiction.

June 16. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

R. F. Wilson, for the appellant, argued that the amount claimed was the balance of an amount ascertained by the signature of the defendant, which amount did not exceed \$800, and the plaintiff abandoned the excess over \$400, all as required by sec. 54 of the Division Courts Act, R.S.O. 1927, ch. 95. Reference to *Re Green v. Crawford* (1910), 21 O.L.R. 36; *Renaud v. Thibert* (1912), 27 O.L.R. 57; *Walsh v. Webb* (1917), 38 O.L.R. 457.

A. L. G. Brooks, for the defendant, respondent, contended that the document sued on as a promissory note was only a part of the original document evidencing the agreement between the parties. This document, reading it as a whole, was a conditional sale agreement, and, to recover on it, it was necessary to prove delivery of the subject of the sale (a piano), which had not been done: *Heintzman v. Young* (1923), 54 O.L.R. 13. The amount claimed, not being an ascertained amount, exceeded the jurisdiction of the Division Court.

Wilson, in reply, said that the fact that the piano had been re-possessed from the defendant shewed that it must have been delivered to him. As to whether the document should be read as a

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It would appear that the piano, having been taken possession of by the defendant, and not being paid for, was repossessed and sold for \$87.50.

The learned trial Judge thought that the requirements of the statute giving jurisdiction to the Division Court were not met.

He says:—

“Applying the principle laid down in the cases just cited to the case in hand, it seems to me that mere production of the note and the contract and proof of the defendant’s signature are not sufficient to establish the claim of the primary creditor so as to give this Court jurisdiction. The primary creditor evidently thought that he had to call witnesses other than to prove the signature of the primary debtor, because the stenographic notes shew clearly that this course was adopted by him. Looking at the primary creditor’s statement of claim, one item therein (namely, proceeds of resale \$87.50) requires evidence outside of the production of the document and the proof of the signature of the maker, and extrinsic evidence was, as I have stated, called to establish this item.”

And again:—

“From what I have written it will be easily gathered that I am not deciding that the primary creditor cannot recover in a proper court the full amount of his claim. All I am deciding is that the amount of his claim is, for the reason stated, beyond the jurisdiction of this Court.”

The statutory provision is in sec. 54 of the Division Courts Act, R.S.O. 1927, ch. 95:—

“Save as otherwise provided by this Act, the court shall have jurisdiction in . . . (d) an action for the recovery of a debt or money demand, where the amount claimed, exclusive of interest, whether the interest is payable by contract or as damages, does not exceed \$400 and the amount claimed is . . . (iii) the balance of an amount so ascertained which did not exceed \$800, and the plaintiff abandons the excess over \$400; but an amount shall not be deemed to be so ascertained where it is necessary for the plaintiff to give other and extrinsic evidence beyond the production of a document and proof of the signature to it . . .” The expression “so ascertained” is fixed in its meaning by sec. 54 (1) (d) (i): that is, “ascertained by the signature of the defendant or of the person whom as executor or administrator he represents.”

Interpreting, then, the present clause by that definition, the Court has jurisdiction in an action for “the recovery of . . . money . . . where the amount claimed . . . does not exceed \$400 and the amount claimed is the balance of an amount ascertained by

the signature of the defendant . . . which does not exceed \$800 and the plaintiff abandons the excess over \$400. . . .”

The prerequisites are (1) the amount claimed does not exceed \$400, (2) the plaintiff abandons the excess over \$400 of an amount (3) which did not exceed \$800, that amount being ascertained by the mere production of a document and proof of signature.

Here (1) the amount claimed does not exceed \$400, (2) the plaintiff abandons the excess over \$400 of an amount (3) which did not exceed \$800, and this amount is ascertained by producing the document and proving the signature. It, consequently, is a case where the statute is literally met. And it is not of the slightest importance that other evidence must be adduced to prove the title of the plaintiff suing here.

Were it necessary for the plaintiff to prove what was obtained on the sale of the repossessed piano—which it is not, that being a matter of defence, having no reference to or necessary connection with the original “amount,” which has to be proved in the statutory manner—that would not be of importance.

The cases in point are *Walsh v. Webb*, 38 O.L.R. 457; *Re Harty v. Grattan* (1916), 35 O.L.R. 348; *Renaud v. Thibert*, 27 O.L.R. 57; *Slater v. Laberee* (1905), 9 O.L.R. 545; *Kreutziger v. Brox* (1900), 32 O.R. 418; *Re Thom v. McQuitty* (1904), 8 O.L.R. 705—some of the dicta in one or more of these cases are to be read with caution.

I can find no reason for excluding the jurisdiction of the Division Court; nor is there any real defence. I would allow the appeal and direct judgment to be entered for the plaintiff for \$400, interest and costs, including the costs of this appeal.

Appeal allowed.

[APPELLATE DIVISION.]

ANDERSON V. E. J. SHEPARD LTD.

1930.

Contract—Exclusive Licence to Use Patented Processes in Specified Territory—Action for Royalties—Defence that Infringers not Prosecuted—Acquiescence—Validity of Patents—Absence of Covenant—Estoppel—Pleading—Amendment—Evidence.

March 31.
June 30.

The plaintiff in an action for royalties alleged that he was in possession of certain patents of processes for making plastic bodies; that he had given the defendant company an exclusive licence to manufacture and sell under these patents within a specified territory; that the defendant company, in consideration thereof, had agreed to pay royalties; that the defendant company had manufactured and

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continued to manufacture under the patents, but had refused to pay royalties. The defendant company set up that the plaintiff had not stopped others from manufacturing under the patents and for that reason it had refused to pay royalties; and it counterclaimed for damages for the inactivity of the plaintiff to force the alleged infringers to cease manufacturing, and for the return of royalties paid. In the agreement between the parties there was no undertaking on the part of the plaintiff to compel those in the defendant company's territory to cease infringing the patents, nor was there a covenant or statement that the patents were valid:—

Held, that no covenant was to be implied: the licensee was a purchaser, *sub modo*, of personal property; and *caveat emptor*.

2. A judgment declaring the patents void would not be a defence to an action for royalties: such an action is brought on the promise, and the validity of the patent is immaterial; the only defence being that the licensee was induced to take the licence by fraud or misrepresentation; the licensee is estopped from disputing the validity of the patent, the estoppel arising at once in the case of a licence under seal, and upon use of the patent by the licensee when the licence is not under seal.
3. There was therefore no defence upon the pleadings as framed; and (reviewing the evidence) the position of the defendant company would not be advanced, if the Court should take all the facts appearing, or even represented as existing, irrespective of the pleadings, and allow an amendment to meet all the facts.

THE plaintiff claimed from the defendant company \$1,831.64 for royalties due to him under an agreement dated the 16th July, 1925, between the parties. The defendant company did not dispute the *amount* of the royalties earned, if it should, in the circumstances existing, be found liable to pay royalties.

The action and a counterclaim were tried before McEvoy, J., without a jury, at a Toronto sittings.

D. H. Porter, for the plaintiff.

D. L. McCarthy, K.C., for the defendant company.

March 31. McEvoy, J. By the agreement, the defendant agrees to pay the plaintiff royalties for the assignment of an exclusive licence under a process for making plastic bodies, particularly building materials such as building blocks, out of certain materials; and undertakes to make certain quantities and to continue to manufacture under the process in such a way as to earn a certain minimum of royalties. The defendant agrees that he will not during the continuance of the agreement question, dispute, or attack in any way, manner or form, in defence of any suit or otherwise, the right of the party of the first part to grant a licence under the patents concerning which the licence was granted; and each of the parties agrees with the other to endeavour to detect any infringement of any patent rights owned or controlled by the party of the first part and promptly to communicate to the other any infraction relative thereto. The party of the

first part agrees to defend the party of the second part in any and all suits for infringement, if any, commenced against the party of the second part by reason of the operation by the party of the second part under this agreement, and to use reasonable diligence, on demand of the party of the second part, to commence and prosecute actions or suits against parties, if any, infringing, within the territory assigned, upon any patent owned or controlled by the party of the first part and in which the party of the second part may be operating. And, if operating under any patent owned or controlled by the party of the first part should be held by a court of competent jurisdiction to be an infringement of any adversely owned patent, obligations to pay royalty should cease until or unless the decree of such court should be reversed on appeal.

The defendant sets up two main defences to the claim of the plaintiff, and counterclaims for damages upon the grounds that he has expended large sums in building a plant to be used in practising the processes which are assigned exclusively within certain territory to the defendant; and for that on account of certain parties infringing the patents, within the territory exclusively assigned to the defendant, the defendant has lost large sums in profits which it would have made had the plaintiff with proper diligence prosecuted the alleged infringers.

The defendant alleges that the whole basis of the dealings between the parties was on the foundation that the plaintiff had patents in connection with the processes which could be enforced; and, in the second place, the defendant sets up as a defence to this action that there are certain actions pending in the Exchequer Court for the purpose of testing the validity of the plaintiff's claim.

No evidence was given to shew me that the plaintiff's patents were not good and valid patents. In view of the term of the contract that the defendant will not attack the validity of the plaintiff's claim during the lifetime of the agreement, by way of defence or otherwise, I am of opinion that this defence fails.

As to the first defence, upon the evidence I find as a fact that there was no such delay on the part of the plaintiff in prosecuting alleged infringers as to provide a defence against the claim for royalties; on the contrary, upon the evidence, I find that the defendant acquiesced in most of what is now alleged to be delay on the part of the plaintiff.

I, therefore, direct judgment to be entered for the plaintiff for the amount of royalties sued for, with costs; and I dismiss the de-

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McEvoy, J. defendant's counterclaim with such costs as were incurred by the
1930. pleading and trial of the counterclaim.

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The defendant company appealed from the judgment of McEvoy, J.

June 16. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

McCarthy, K.C., and J. C. M. German, for the appellant company, argued that it should not have to pay the royalties under the Straub process, because the plaintiff, in selling it, had nothing to sell. There was no patentable process upon which an exclusive licence could be granted to the appellant company. No royalties are due to the plaintiff by the appellant company until the plaintiff has taken proceedings to restrain persons from infringing the patent under which the appellant company is operating. Even if the want of validity of the patent were not a defence, the plaintiff having undertaken to prove the validity and failed, the appellant company was not bound by the agreement. When the company started to manufacture under the Straub process, it was not acting under the agreement, because the plaintiff had no rights to give it. The appellant company was just manufacturing like one of the public. It should get back the royalties paid under the Straub process, and recover damages as prayed.

Porter, for the plaintiff, respondent, contended that all parties, including the appellant company, knew at the time of the agreement that the respondent was just negotiating for the Straub process. There is no evidence that the Straub process is invalid; and, if it were invalid, that would be immaterial. There was no evidence of infringement, so there could be no claim against the respondent for not bringing an action for infringement. The respondent did not guarantee the validity of the patent. Reference to *Channell Ltd. v. O'Cedar Corporation*, [1928] S.C.R. 542; *Duryea v. Kaufman* (1910), 21 O.L.R. 161.

June 30. The judgment of the Court was read by RIDDELL, J.A.:—The statement of claim sets out that, by a written agreement between the plaintiff and defendant, the defendant agreed to pay the plaintiff certain royalties, in consideration of a licence to him by the plaintiff to manufacture and sell under a certain patent; that the defendant did so manufacture and sell, and paid royalties for a time but then refused to continue to do so. The statement of defence sets out that the plaintiff owns certain processes, called the BO and the Straub processes, and the defendant was by the said agreement given the right to manufacture under

them; that the agreement was entered into on the "foundation that the plaintiff had patents in connection with the said processes, which could be enforced;" that others commenced to manufacture "similar" goods; that the agreement called upon the plaintiff to force them to cease doing so, or it would cease paying royalties; that the plaintiff contended that these parties were not infringing his patents, and did not move to compel them to cease, saying that he had litigation pending in the United States which made such a course inadvisable.

"10. The defendant takes this attitude—it will be well satisfied and good business for the defendant, if the plaintiff establishes his patents as good and secures an injunction against all the alleged infringers, whereupon the defendant will, of course, resume paying royalties, subject to the counterclaim hereinafter set forth."

Then follows a counterclaim for damages, *inter alia*, for "the inactivity of the plaintiff to force the alleged infringers to cease manufacturing;" and also for the return of royalties paid.

The case went down to trial with the pleadings in this shape; no amendment has been made; and, at the trial, Mr. Justice McEvoy gave judgment for the plaintiff and dismissed the counterclaim; the defendant now appeals.

It will be seen that the matter reduces down to (1) the possession of certain patents by the plaintiff; (2) a licence to manufacture, etc., under them, given by the plaintiff to the defendant; (3) an agreement by the defendant to pay royalties; (4) manufacture, etc., by the defendant under the patents; (5) contention by the defendant that the plaintiff has not stopped others from manufacturing, etc., under these patents; and (6) refusal to pay royalties for that reason.

What was relied on as calling upon the plaintiff to compel others to cease from using the patents is the following:—

"The party of the first part grants unto the party of the second part an exclusive licence under said process to practise said process and to make, use, and sell said product, within but only within the above specified territory. This licence shall be construed to grant rights of the same scope under other patents and processes in or relating to the art of making plastic bodies that may be hereafter owned or controlled by the party of the first part. This licence shall continue for a period of 14 years from the date hereof."

It will be at once apparent that there is here no undertaking on the part of the plaintiff to compel those in the defendant's

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It is clear law that no covenant will be implied in such a case: the licensee is a purchaser, *sub modo*, of personal property; and *caveat emptor*. "If there are no express covenants on the part of the licensor as to his power to grant the licence, and as to the validity of the patent, the law will not import any, since the privilege created by letters patent is impressed with the nature of personality, and the law will not create a covenant respecting a personal thing." Frost, *Letters Patent for Inventions*, 3rd ed., vol. 2, pp. 150, 151, citing Com. Dig., tit. Covenant A.4.

Nor is the case of the defendant advanced by what has taken place since, viz., a failure to obtain a judgment declaring that the alleged offenders were infringing the patents. In fact, as is admitted, the judgment did not declare the patents void; and, even if it had, the judgment is no defence to the action for royalties: *Grover and Baker Sewing Machine Co. v. Millard* (1862), 8 Jur. (N.S.) 713; *African Gold Recovery Co. Ltd. v. Sheba Gold Mining Co. Ltd.* (1897), 14 R.P.C. 660; Halsbury's *Laws of England*, vol. 22, p. 196, para. 403.

The licensor does not warrant the validity of his patent except by express covenant: *Electric Fireproofing Co. of Canada v. Electric Fireproofing Co.* (1910), 43 Can. S.C.R. 182.

In an action for royalties, the action is on the promise, and the validity of the patent is immaterial: *Gillies v. Colton* (1875), 22 Gr. 123; and a long line of cases cited in 8 C.E.D. (Ont.) in article "Patents of Inventions," sec. 27; the only defence being that the licensee was induced to take the licence by fraud or misrepresentation: Halsbury's *Laws of England*, vol. 22, p. 196; *Jandus Arc Lamp and Electric Co. v. Johnson* (1900), 17 R.P.C. 361; *Hall v. Conder* (1857), 2 C.B.N.S. 22; *Lawes v. Purser* (1856), 6 E. & B. 930; *Duryea v. Kaufman*, 21 O.L.R. 161—though in some cases the breach of a covenant on the part of the licensor may relieve: *Green v. Watson* (1883), 2 O.R. 627.

Sometimes the rule is stated thus: The licensee is estopped from disputing the validity of the patent: *Whiting v. Tuttle* (1870), 17 Gr. 454; *Indiana Manufacturing Co. v. Smith* (1904), 9 Can. Ex. C.R. 154. This estoppel arises at once in the case of a licence under seal, and upon use by the licensee of the patent when the licence is not under seal: Frost, *op. cit.*, p. 148; *Lawes v. Purser*, *ut supra*; *Nolon v. Brooks* (1861), 7 H. & N. 499; *Crossley v. Dixon* (1863), 10 H.L.C. 293, 308, 310; *Clark v. Adie* (1877), 2 App. Cas. 423.

On the pleadings as they stand, there is no defence; nor, as I think, is the position of the defendant advanced, if we are at liberty to take and should take all the facts appearing or even represented as existing, irrespective of the pleadings, and allow an amendment to meet all the facts. The following would seem to be the facts: When negotiations were made leading to the agreement and licence, it was understood that the plaintiff had the right to grant licences under the BO patent, and was about acquiring a similar right in respect of the Straub patent; the parties bargained upon this footing, and consequently, while the licence was to use the BO patent, a clause was introduced to cover the Straub patent as well. This reads:—

“This licence shall be construed to grant rights of the same scope under other patents and processes in or relating to the art of making plastic bodies that may be hereafter owned or controlled by the party of the first part.”

The following clause provided for the operation going on:—

“The party of the second part agrees that it will manufacture plastic bodies of good and merchantable quality and finish, in accordance with said process, and will use its best endeavours to extend and increase the sale of the same, and diligently carry on such manufacture and sale on a scale and to such extent as shall be necessary to reasonably supply the demand for the same within said territory, and will diligently place said plastic bodies on the market and sell the same within said territory at a price which the party of the second part shall fix, but which shall be reasonable, bearing in mind the actual cost of production, marketing, royalty, and a fair profit.”

For some time, the defendant went on under the BO process, and then adopted the Straub process, as entitled so to do under the clause in the licence already quoted, paying royalties under the licence. It is perfectly obvious that this it did, believing that it had the right so to do under that clause, and it seems perfectly clear that the payments would have continued but that others were not prevented from using the new method. And it is clear that this was in contemplation from the beginning. I think that the position of the defendant must be that the agreement on its part to continue the operations under the BO patent is either in existence or it is not; if it is, the plaintiff is entitled to damages for breach of it by the defendant, and these damages will be determined on the footing of the royalties which would have been payable had the process continued—and that amount will naturally be the amount of the royalties claimed here. If, on the other hand, the said agreement is not in existence, it must be considered to have

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ceased on accord and satisfaction, i.e., the substitution of another agreement to pay the royalties as though the BO process was continued. *Quâcunque viâ*, I think the plaintiff is entitled to the amount, the defence of invalidity of the patent not being available to the defendant, even if such invalidity were proved, as it has not been.

On the whole, whether we abide by the pleadings or amend them to meet the proved facts, the defendant cannot succeed, and the appeal should be dismissed with costs.

Appeal dismissed.

[APPELLATE DIVISION.]

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June 30.

Negligence—Motor-vehicles—Collision at Intersection of Provincial Highway with Concession-road—Right of Way—Excessive Speed—Drivers of both Vehicles Guilty of Negligence—Apportionment of Blame—Contributory Negligence Act, R.S.O. 1927, ch. 103, sec. 3 (1)—Division Courts Act, R.S.O. 1927, ch. 95, sec. 54—Personal Action Brought in Division Court—Limit of Amount Recoverable—Whether Apportionment of Damages Based upon Amount Claimed or Whole Amount of Loss Incurred—Abandonment of Excess.

In an action in a Division Court for damages for injury to the plaintiff's motor-vehicle by a collision with the plaintiff's motor-vehicle at the intersection of two highways, the plaintiff claimed \$120 and the defendant counterclaimed for \$32.75 for injury to his vehicle. The trial Judge found that the collision was caused by the defendant's negligence and that there was no contributory negligence; and directed judgment to be entered for the plaintiff for \$120 and costs.

It appeared that the plaintiff was driving in a southerly direction along a provincial highway and the defendant in a westerly direction approaching that highway on a concession-road.

Held, upon appeal by the defendant, that he was guilty of negligence in attempting to cross the highway at a time when he knew that the plaintiff had the right of way and the plaintiff's vehicle was approaching at a high rate of speed, and the finding of the trial Judge upon that point could not be disturbed.

But *held*, that the plaintiff also was guilty of negligence in approaching the intersection at an unlawful and excessive rate of speed (about 40 miles an hour).

Both being guilty of negligence, the degree of fault attributable to the plaintiff was 40 per cent. and that to the defendant 60 per cent. The limit of a Division Court's jurisdiction in an action of this kind being \$120 (sec. 54 of the Division Courts Act), and that being the amount claimed in the action, it was *held* (ORDE, J.A., dissenting), that the apportionment of the damages should be based upon that sum, and not upon the total damage the plaintiff had suffered, as shewn by the evidence, amounting to \$196.50.

In the result, the plaintiff was entitled to judgment for \$72 and costs and the defendant to judgment for \$6.46 and costs, with the right

of set-off, and no costs of the appeal should be allowed to either party.

Per MASTEN, J.A.:—The plaintiff, when he entered the action in the Division Court, definitely and irretrievably abandoned all damages in excess of \$120.

Per ORDE, J.A.:—The limit of \$120 placed upon the Division Court's jurisdiction in personal actions is a limit upon the amount recoverable by the judgment of that court. It is immaterial by what steps the amount due to the plaintiff in respect of a single cause of action is ascertained and fixed. When so ascertained, judgment may be given thereon, but not for an amount in excess of the court's limited jurisdiction.

Stark v. Batchelor (1928), 63 O.L.R. 135, referred to.

AN appeal by the defendant from the judgment of MAHON, Co. C.J., in a Division Court action, in favour of the plaintiff. The action was brought to recover \$120 damages for injury to the plaintiff's motor-vehicle by a collision with the defendant's motor-vehicle at an intersection of two highways. The defendant counterclaimed for \$32.75 damages for injury to his vehicle. The County Court Judge found that the collision was caused by the defendant's negligence and that there was no contributory negligence; and directed judgment to be entered for the plaintiff for \$120 and costs.

May 6. The appeal was heard by LATCHFORD, C.J., MASTEN, ORDE, and FISHER, J.J.A.

G. P. Campbell, for the appellant, argued that it was the plaintiff's negligence which caused the collision. He approached the intersection at a speed of 40 miles an hour, an excessive rate in the circumstances. Although the plaintiff had the right of way, he should have reduced his speed when he saw or should have seen the defendant approaching the intersection.

Douglas G. Kerr, for the plaintiff, respondent, contended that the accident was wholly due to the defendant's negligence in not coming to a full stop as required by the statute and in attempting to cross the highway when he saw the plaintiff approaching at a high rate of speed. If the Court should think that the plaintiff was guilty of contributory negligence, the apportionment of negligence should be based on the damage disclosed in the evidence, and not on the amount claimed in the action.

Campbell, in reply, contended that the plaintiff was at least guilty of contributory negligence, and, if this were found, the apportionment should be on the basis of the amount claimed in the action.

June 30. FISHER, J.A.:—The plaintiff was, on Sunday the 27th October, 1929, between the hours of 3 and 4 p.m., driving an automobile in a southerly direction along provincial highway num-

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ber 2, in the county of Kent, and the defendant was driving his automobile in a westerly direction on the 4th concession-road approaching that highway. The plaintiff's speed prior and up to the time of the collision is admitted to have been at the rate of 40 miles per hour. The defendant states that he first observed the plaintiff's car approaching when he was distant from the highway about 8 or 9 rods, and that the plaintiff was then about 300 feet north of the intersection and going at a fast rate of speed, and thereafter the defendant reduced his speed and had almost come to a stop at or near the stop-sign, and, thinking he had time to cross the highway in safety, again started up his car slowly; but, as there was a down grade, his car "rolled down" on the highway, and when he had just crossed the centre of the highway and had almost made a turn in a southerly direction on the westerly side, he was struck by the plaintiff's car at a point slightly west of the centre of the side-road. On this evidence the trial Judge held—and I agree—that the defendant was guilty of negligence in attempting to cross the highway at a time when he knew that the plaintiff had the right of way and his car was approaching at a high rate of speed. It is quite clear that the defendant's duty in such circumstances was to have stopped and waited until the plaintiff had passed the intersection.

The next question is: was the plaintiff guilty of any negligence contributing to the accident? The learned trial Judge, as stated, found he was not, but, with respect, I do not agree. It is evident from the plaintiff's conduct that, because he was driving on a public highway and had the right of way, he thought he was entitled to proceed at any rate of speed he wished, utterly regardless of any one or anything that might come into the highway from an intersection. Clearly he had no such right. Although the plaintiff had the right of way and the right to travel at 35 miles per hour, he was not entitled to disregard or dismiss from his mind the defendant's approach to the highway which he could or should have seen when he was distant at least 300 feet from the intersection.

The evidence indicates that the defendant had reached the intersection prior to the plaintiff, and therefore he had a right to proceed if there was at that time reasonable ground for believing that he had time to cross the highway in safety before the plaintiff would reach the intersection, and therefore it was the plaintiff's duty, instead of keeping up his unlawful speed of 40 miles per hour, to have taken reasonable care by reducing his speed and having his car under control; and, if that had been done, there would have been no accident.

If a driver approaching an intersection observes or should observe anything or any one at the intersection that may give cause for danger, his plain duty is, if he has the time, to reduce his speed and do his best to avoid a collision.

Masten, J.A., in *Hanley v. Hayes* (1924), 55 O.L.R. 361, clearly outlined the duty of drivers at intersections. That case decided that, though the driver on the right has, by the statute, the right of way, it still remains his duty to exercise reasonable care to avoid a collision with vehicles approaching on his left.

The plaintiff's negligence may be shortly summarised:—

(a) In approaching and continuing to approach the intersection at an unlawful and excessive rate of speed.

(b) That when he observed or should have observed the defendant's car approaching, and it had actually reached the intersection, he should have reduced his speed and had his car under control.

(c) If it had not been for his excessive rate of speed and the failure to exercise care at and prior to the time of impact—the defendant's car being almost wholly on the west side of the provincial highway—he had sufficient room and could have passed on the north side in safety, as there was then no approaching traffic.

The defendant's negligence consisted in:—

(a) Not coming to a full stop, as required by the statute.

(b) Proceeding to cross the highway when he knew the plaintiff was only 300 feet away and going at a high rate of speed.

In arriving at these conclusions I have not overlooked the fact that it does not always follow that because a driver fails to reduce his speed at an intersection he is guilty of negligence. It always depends upon the particular circumstances or facts arising at the time.

The only remaining question for determination is the degree of fault to be attributed to both parties and the apportionment of damage. On the evidence I think a fair division would be that the plaintiff is liable to the extent of 40 per cent. and the defendant 60 per cent.

It was argued by counsel for the plaintiff that, if this Court was of opinion that the plaintiff was guilty of contributory negligence, the apportionment of the degree of negligence should not be based on the amount claimed in the action, but on the total damage the plaintiff had suffered, as disclosed by the evidence, namely, the sum of \$196.50. In all personal actions founded on tort, the jurisdiction of the Division Court is limited to \$120. In the present case the plaintiff deliberately chose the particular

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forum in which he desired to have his action tried, and claimed in that court \$120 damages for a tort—that was the amount in controversy—and, as the trial Judge gave the plaintiff judgment for that amount, it must, I think, follow that this Court is not entitled to consider any damages the plaintiff may have had or the evidence disclosed he had, beyond that amount.

I am of opinion that “the entire amount of damages” referred to in the Contributory Negligence Act, 1924, 14 Geo. V. ch. 32, sec. 3(1), is the amount of damages recoverable in the action, and cannot be construed as meaning or applying to any damages other than those claimed in the action. In this case, if the plaintiff’s contention was given effect to, it would follow that, if this Court was of opinion that the defendant’s degree of fault was 80 per cent. instead of 60 per cent., the plaintiff would be entitled to \$156.80 or a sum of \$36.80 beyond the amount he claimed in the action.

The result is that the degree of fault attributed to the defendant as found must come off the plaintiff’s claim as sued.

On the argument it was admitted that the defendant was not entitled to recover the \$16.75 item set out in the account.

I would allow in part the defendant’s appeal and award the plaintiff judgment for \$72 damages and costs, and the defendant judgment for \$6.46 and costs, with right of set-off; and there should be no costs of this appeal.

LATCHFORD, C.J., agreed with FISHER, J.A.

MASTEN, J.A.:—The facts connected with this appeal are adequately set forth in the judgments of my brothers Orde and Fisher.

I have been greatly impressed by the powerful reasoning of my brother Orde; but, nevertheless, after giving the matter the most careful attention of which I am capable, I find myself unable to concur in the view to which his reasoning leads.

Section 54(1) (a) of the Division Courts Act, R.S.O. 1927, ch. 95, provides as follows:—

“Save as otherwise provided by this Act the Court shall have jurisdiction in a personal action where the amount claimed does not exceed \$120.”

In my opinion “claimed” for the purpose of judgment is one thing and “claimed” for the purpose of fixing the jurisdiction of the Court is quite another. Judgment can be entered for no more than the amount claimed, but in ascertaining that amount it may be necessary to give evidence of damages exceeding the amount claimed. But that rule has nothing to do with ascertaining the jurisdiction of the Court, which, in my opinion, is limited by the

size of the transaction, or, in other words, by the amount of the damages which the plaintiff must prove in order to have a recovery of the balance claimed. If the plaintiff, in making a case necessary to entitle him to recover a balance of \$120, is obliged to establish a claim for more than \$120, he ousts the jurisdiction of the Court, as it seems to me. If this were not so, the size of the transaction into which the Division Court could enter would be unlimited. To test the point, take as an extreme example a collision where the plaintiff claims a recovery though he admits that he is himself 95 per cent. to blame. In such a case, if he claims \$120, the total damage which he would necessarily prove himself to have suffered would be \$2,400. Further, if the defendant also suffered damage in the collision, so that the damage of both has to be brought into hotchpot, the total damages would be higher yet. This does not affect the question of costs as laid down in *Stark v. Batchelor* (1928), 63 O.L.R. 135. Subsections (1) (c) and (1) (d) of sec. 54 support the view which I have just expressed, for it is especially provided in (c) that the whole account must not exceed \$1,000, and in (d) that the original obligation shall not exceed \$800, while no similar extension of the jurisdiction is provided in (1) (a), and the damages to be considered are therefore limited to the amount claimed, or in the alternative they are entirely unlimited, and matters of any amount whatever may be tried in the Division Court, provided the balance resulting is no more than \$120.

For this reason I am of opinion that in entering the suit in the Division Court all damages in excess of \$120 were definitely and irretrievably abandoned by the plaintiff.

I should add that I have searched very carefully for any additional light which might be thrown on the question by the provisions relative to jurisdiction in other courts, and the provisions of the English County Courts Act of 1888 seem to me to throw a side-light on the question, though, of course, not binding on this Court. Section 57 of the County Courts Act of 1888 provides as follows:—

“Where in any action the debt or demand claimed consists of a balance not exceeding £100, after an admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff, the court shall have jurisdiction to try such action.”

Under that section it has been determined that the words “balance of account” mean, “after payment of part, or after the allowance of a set-off as an item in account with the agreement of the parties, which is equivalent to the demand of part, and not when the plaintiff claims more than £100 and seeks to reduce it by giving the defendant credit for a simple set-off . . .

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Where a plaintiff's claim exceeded £100 and he offered to reduce it by admitting a set-off, never agreed to by the parties so as to amount to a part payment, the court was held to have no jurisdiction, even if the plaintiff gave credit for the set-off in his particulars, or offered to assent to it after action." Annual County Courts Practice, 1930, p. 38; referring to *Avards v. Rhodes* (1853), 8 Ex. 312; *Woodhams v. Newman* (1849), 7 C.B. 654; and *Beswick v. Capper* (1849), 7 C.B. 669.

For these reasons, I concur in the view which has been expressed by my brother Fisher.

ORDE, J.A.:—The facts are sufficiently set forth in the judgment of my brother Fisher and need not be repeated.

We all agreed at the hearing that the finding of negligence against the defendant could not be disturbed, but we also agreed that the learned trial Judge had erred in finding that the plaintiff had not been guilty of contributory negligence. The fact that the plaintiff was travelling upon a "through highway" did not absolve him from the duty of having his car under proper control when approaching a cross-road.

We were also of the opinion that the proportionate degree of fault under the Contributory Negligence Act, R.S.O. 1927, ch. 103, should be fixed at 60 per cent. as against the defendant and 40 per cent. as against the plaintiff.

But for the fact that there is a difference of opinion among the members of the Court upon the other point, namely, as to the effect of the apportionment upon the amount for which judgment should be entered for the plaintiff, I should have considered the matter too plain for any serious argument.

The action is for damages for negligence, and is launched in a Division Court. The Court's jurisdiction over such an action is limited to cases "where the amount claimed does not exceed \$120."

By the claim or plaint here the plaintiff claims from the defendant the sum of \$120 for damages suffered by the plaintiff as the result of the collision in question. The trial Judge found that the actual damages sustained by the plaintiff were \$184, and accordingly gave him judgment for the \$120 claimed. That judgment, if undisturbed, would of course stand as a complete satisfaction for the whole of the plaintiff's damages, not only by reason of sec. 60 of the Division Courts Act, R.S.O. 1927, ch. 95, but upon the elementary ground that the plaintiff had but one cause of action for an unliquidated amount, which would of necessity be merged in the judgment.

The defence of contributory negligence having succeeded as a result of our judgment, it remains to determine the amount for which the plaintiff is entitled to judgment, having regard to the limit of the Division Court's jurisdiction. In my opinion, it is our duty in the first place to find out what are the damages which, according to the law applicable to the circumstances of the case, the defendant ought to pay the plaintiff in respect of his cause of action, and then to give him judgment therefor, but not in excess of the limit of the Court's jurisdiction, namely \$120.

It is erroneous to speak of the plaintiff's election to sue for \$120 in the Division Court, and to term it an "abandonment of the excess," as constituting a binding declaration or admission that the total loss which he suffered as a result of the accident is to be treated as no more than \$120. It is doubtful in my mind if the plaintiff abandoned any excess at all in the sense in which that phrase is used in the Division Courts Act. Its real application—and I think the only one intended by the Act—is to claims for liquidated amounts when the cause of action cannot be set up without disclosing that it really entitles the plaintiff to a larger sum than the limit of the Court's jurisdiction, and so in order that the plaintiff may sue in a Division Court upon the cause of action at all, he must expressly abandon the excess and lose all right, if he gets judgment, ever to claim for the amount so abandoned. The necessity for any such express abandonment does not arise when the cause of action is for unliquidated damages.

If the plaintiff chooses to sue in the Division Court and to limit the amount which he seeks to recover accordingly, he is not required to abandon anything. There is no difference between a case so brought in the Division Court and one brought in the County Court for an amount within the County Court jurisdiction, when the plaintiff might have sued in the Supreme Court for a larger sum.

It must be remembered that, where a plaintiff is guilty of contributory negligence, the reduction in the damages otherwise recoverable is not in any sense a counterclaim or set-off. That reduction is merely a matter of defence. It is quite independent of, and has nothing to do with, any damage which the defendant himself may have suffered as a result of the plaintiff's negligence. This is all made clear by the judgment in *Stark v. Batchelor*, 63 O.L.R. 135, and especially at pp. 139 and 141.

What is a plaintiff to do who, knowing that a finding of contributory negligence *may* be made against him, nevertheless desires to sue? He is under no obligation to admit his own negligence, which is purely a matter of defence to his own claim for

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damages, and as such must be raised by the defendant. But the plaintiff may, nevertheless, desire to anticipate the probability of such a defence being made good and so save needless costs by suing in an inferior court. If he were to admit the contributory negligence in his claim, and state that by reason thereof the amount of his actual damage should be reduced to \$120, it could hardly be suggested that if upon the trial he proved his case and the proportionate amount which he admitted should be deducted was found to be fair, he would not be entitled to judgment for the full \$120. Can it make any difference if he does not admit his contributory negligence, but leaves it, as he has the clear right to do, to the defendant to plead it?

That the mere abandonment of, or failure to claim, the excess over and above the amount justly due in order to bring the case within the jurisdiction of the Division Court, when the cause of action is one and indivisible, does not operate as a release or admission until the cause of action has merged in the judgment, is settled by authority: see Bicknell and Seager's Division Courts Act, 3rd ed., p. 103, and particularly *Winger v. Sibbald* (1878), 2 A.R. 610. If the plaintiff discontinues or withdraws the action, he may sue in a higher court for the full amount.

When the plaintiff here sued for the sum of \$120, he did not say either in words or in effect that that was the total loss which he sustained in the accident, and no such inference can fairly or legally be drawn from the fact that he chose to come to the Division Court for relief. What he said in effect, and as a matter of pleading, was that as a result of the accident and of the law fixing the defendant's liability in respect thereof, the defendant was liable to pay him the sum of \$120.

To hold otherwise will lead to extraordinary results. If, for example, a plaintiff whose actual loss is \$240 chooses to sue for \$120 only, and then, because he is found guilty of contributory negligence to the extent of, say 50 per cent., can get judgment for \$60 only, the only means whereby he can recover the full amount legally due him is to sue in the County Court. If he is bound to sue in the County Court, then he must get County Court costs. And, if that is the case, then this Court was wrong in *Ottawa Civic Hospital v. Gibson* (1929), 36 O.W.N. 200, where the plaintiff, whose actual loss amounted to \$177.01, but which was reduced by a deduction of 75 per cent. because of his contributory negligence so that he recovered only \$44.25, was held to be entitled to Division Court costs only.

The limit of \$120 placed upon the Division Court jurisdiction in personal actions is a limit upon the amount *recoverable* by the

judgment of that court. It is immaterial by what steps the amount due the plaintiff in respect of a single cause of action is ascertained and fixed. When so ascertained, judgment may be given thereon, but not in excess of the court's limited jurisdiction.

The plaintiff here is entitled to recover upon his claim 60 per cent. of his \$184, namely, \$110.40, and Division Court costs.

Success being divided, there should be no costs of the appeal.

Appeal allowed in part (ORDE, J.A., dissenting in part).

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ANDERSON

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PARNEY.

Orde, J.A.

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June 30.

Will—Construction—Direction for Conversion of so much of Estate as may be Necessary for Carrying out Provisions of Will—Implications—Limitation to Investments Authorised for Trustees—Exchange by Trustees of Shares in Company for Shares of another Company—Conditional Approval.

The testator, by his will, after appointing executors and trustees, gave all his property and estate to them upon trust: "(a) To sell, call in, or otherwise convert into cash, so soon as reasonably may be after my decease, so much of my property as may be necessary for the purpose of carrying into effect the provisions of this my will." Then, after providing for the payment of debts, testamentary expenses and succession duties, he directed his executors and trustees to set aside his residence, his household furniture, and his motor-cars, for the use of his wife for life or until remarriage, with certain provisions for the sale thereof, and the substitution of another residence and other furniture if the widow wished it. He then directed payment of certain annuities, and that, after satisfying these, the remaining annual income of the estate should be divided equally between his son and daughter. The final distribution of the estate was to be made when all the beneficiaries, other than the son and daughter, should have died, but it was also provided that upon the death or remarriage of the widow the trustees should set aside enough to provide for the payment of any other annuities and divide the remainder of the estate between the son and daughter. There were also special provisions for the event of either son or daughter dying before the time for distribution without leaving children, with an ultimate remainder, if those gifts should fail, to the testator's brother and sister or their respective children. Except as above stated, there was in the will no direction or power given as to the conversion or otherwise of any part of the estate; and there was no express power or discretion conferred upon the trustees to retain any of the assets in the form in which they were invested at the death of the testator or to invest or re-invest in securities other than those authorised by law for trustees. Letters of administration with the will annexed were granted to a trust company and the son and daughter of the testator:—

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Held, that para. (a) of the will did not permit the administrators to retain or hold any part of the estate, other than the residence, the furniture and the motor-cars, in any form of investments other than such as are authorised by law for trustees.

The rule in *Howe v. Lord Dartmouth* (1802), 7 Ves. 137, applied.

Part of the estate consisted of shares in a company; under some arrangement the shares of that company became exchangeable for shares of another company, and the administrators made the exchange, which was approved by the Court, but merely as a step towards the complete conversion of the shares and upon the condition that they should be duly converted.

MOTION by the administrators with the will annexed of the estate of the late John Bingham for an order declaring the true interpretation of his will as to their powers and duties with respect to the conversion and investment of his estate.

June 21. The motion was heard by ORDE, J.A., in the Weekly Court, Ottawa.

H. P. Hill, K.C., for the applicant.

J. F. Smellie, K.C., for the Official Guardian, representing born and unborn infants.

No one appeared for the other beneficiaries named in the will, though duly notified.

June 30. ORDE, J.A.:—The testator died on the 16th October, 1929. By his will dated the 25th January, 1925, he appointed his wife, his daughter, and his son the executors and trustees of his will. They did not obtain probate as executors, but they all renounced in favour of the Toronto General Trusts Corporation, Margaret Lillian Bingham (the daughter), and William Frederick Bingham (the son), to whom letters of administration with the will annexed were granted. What effect this had upon the trusteeship of the three who were expressly appointed trustees of the will was not discussed, nor was it disclosed whether or not the widow had expressly disclaimed as a trustee. The refusal to take probate probably had the effect of a disclaimer on her part.

It was apparently assumed upon the motion that the three administrators, two of whom were also by the will appointed trustees, were all vested with the powers and were subject to the obligations of the three trustees appointed by the will, and for the purposes of the motion I shall assume that to be the case.

All the beneficiaries named in the will were notified of the motion, but no one appeared for them as such. The son and daughter were of course represented in their capacity of administrators.

By his will, the testator, after appointing the executors and trustees, gives all his property and estate to the executors and trustees upon trust:—

“(a) To sell, call in, or otherwise convert into cash, so soon as reasonably may be after my decease, so much of my property as may be necessary for the purpose of carrying into effect the provisions of this my will.”

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Then, after providing for the payment of debts, funeral and testamentary expenses and succession duties, and a declaration that all the gifts contained in the will are to be free from such duties, the will proceeds to direct the executors and trustees to set aside his residence, his household furniture, and his motor-cars for the use of his wife for life or until remarriage, with certain provisions for the sale thereof, and the substitution of another residence and other articles of furniture if his widow wishes it.

Then there is the provision for the payment to his widow of two annuities, one for the upkeep of the home and the other for her personal use, and of annuities to his sister and to her son and daughter, and in certain events an annuity to his brother. After satisfying these annuities, the remaining annual income of the estate is to be divided equally between the testator's son and daughter.

The final distribution of the estate is to be made when all the beneficiaries, other than the son and daughter, shall have died, but it is also provided that upon the death or remarriage of the widow the trustees are to set aside enough to provide for the payment of any other annuities, and to divide the balance of the estate between the son and daughter. There are also special provisions for the event of either son or daughter dying before the time for distribution, with power to appoint by will if leaving children, with cross-remainders in favour of the son and daughter respectively if either should die before the time for distribution without leaving children, with an ultimate remainder, if these gifts fail, to the testator's brother and sister or their respective children.

The question submitted for determination turns upon the meaning and effect of para. (a) above quoted. Nowhere in the will is there any other direction or power as to the conversion or otherwise of any part of the estate, except the special provision as to the use of the residence and the furniture by the widow and the sale thereof and the substitution of other property therefor. There is no express power or discretion conferred upon the trustees to retain any of the assets in the form in which they were invested at the death of the testator or to invest or re-invest in securities other than those authorised by law for trustees. So that the sole question is whether or not para. (a) in any way affects or modifies

Orde, J.A. the powers and duties conferred and imposed by law upon the
trustees, and, if so, to what extent?

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The estate here is a large one, its gross value being about \$1,000,000, with debts of about \$182,000. Among the assets were a great many shares of common and preferred stock in corporations which are not such investments as are authorised for trustees.

The administrators are uncertain as to the meaning of para. (a). They fear that by the trust to convert "so much of my property as may be necessary for the purpose of carrying into effect the provisions of this my will" the testator may be deemed to have intended that, after realising enough to pay the debts, the funeral and testamentary expenses, and the succession duties, the remaining portions of his estate must be retained *in specie* and are not to be converted or re-invested at all. What they wish is to be allowed to retain such portions of the estate as they see fit, in their present form, but with the power in their discretion to sell whenever they see fit and to re-invest. They do not suggest, as I understand them, that any such re-investments should be otherwise than those authorised for trustees, but they wish to postpone the conversion of the present estate and its re-investment as long as in their discretion may seem advisable.

The Official Guardian will not agree that the clause in question is capable of any such construction, and argues that it in no way affects or modifies the duty of the trustees to sell and convert the whole estate (other than the residence and the furniture) or so much thereof as is not already in the form of authorised investments, and to re-invest the proceeds according to law.

It is a well-settled rule that where there are gifts of a testator's residuary personal estate to persons in succession (for example, to one or more for life with remainder to others), and there is no trust for conversion, and the estate is not invested in authorised securities, then, unless it is expressly or by implication provided by the will that the estate is to be enjoyed *in specie*, it must be converted and invested in securities authorised by law.

This rule is usually called the rule in *Howe v. Lord Dartmouth* (1802), 7 Ves. 137, 1 W. & T.L.C., 9th ed., p. 60. It was even then no new rule, but was so stated by Lord Eldon in that case as to have given the name of the case to the rule ever since. The foundation for the rule rests, not upon the necessity for safeguarding the assets of the estate as such, but upon the duty of those administering the estate to act impartially between the beneficiaries. So that, if the estate consisted of wasting properties, such as leaseholds or terminable annuities, it was necessary to convert them for the protection of the remainderman, and on the other hand if it

consisted of a reversion or some other non-revenue producing property, conversion was necessary in order to provide an income for the life-tenant. And the same rule was applied to investments of a speculative or hazardous character. Their conversion into authorised investments was necessary if the interests of both life-tenants and remaindermen were alike to be safeguarded.

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There can be no doubt in the present case that if para. (a) were omitted from the will it would be the imperative duty of the trustees to convert the estate, except the residence and furniture, and invest the proceeds in authorised securities. There is nothing in the language of the rest of the will to indicate that the beneficiaries were to enjoy their gifts *in specie*. Under the trusts of the will this would be impossible, for all the revenue would first come to the hands of the trustees and be by them used first in paying the annuities and then under para. (i) in dividing the surplus equally between the son and daughter in quarterly instalments.

"It has been laid down that the rule in *Howe v. Lord Dartmouth*, requiring conversion, must be applied unless there is a sufficient indication of intention against it, and that the burden of proof in every case rests upon the person who says it is not to be applied:" *Snell's Equity*, 18th ed., p. 140; and see *Macdonald v. Irvine* (1878), 8 Ch. D. 101, at p. 121.

Does para. (a) indicate any such intention? And in endeavouring to discover its intention I am not at liberty to speculate as to what the testator may have desired. In the language of the editors of *White & Tudor's Leading Cases in Equity*, 9th ed., vol. 1, p. 71, "The rule did not originally ascribe to testators the *intention* to effect such conversions, except in so far as a testator may be supposed to intend that which the law will do; but the Court, finding the intention of the testator to be, that the objects of his bounty shall take successive interests in one and the same thing, converts the property, as the only means of giving effect to that intention."

Is there really anything in the language of para. (a) which can be fairly interpreted as an indication of a real intention that the interests of either life-tenants or remaindermen were to be imperilled by retaining the bulk of the estate *in specie* until the period of distribution? If the direction to convert "so much of my estate as may be necessary for the purpose of carrying into effect the provisions of this my will" by restricting the conversion to a realisation of sufficient to pay debts, expenses and succession duties, carries with it, as suggested by the trustees, some implication as to the non-conversion of the balance, what is that implica-

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tion? It can surely only be that the balance was not to be converted at all but should be retained *in specie*. Could the testator really have intended any such thing? I can see no ground for holding, as the trustees would like me to hold, that as to the balance the question of conversion should be a matter for their discretion. The will says nothing about discretion upon this point. The implication from the language of para. (a), if there is any implication, must be to the effect that the balance is not to be converted at all. There is no middle course.

In my opinion it is putting altogether too narrow a restriction upon the words "for the purpose of carrying into effect the provisions of this my will" to limit them to the payment of "debts, expenses and succession duties." Why should the carrying into effect of the provisions of the will be limited to the merely incidental matter of paying debts, expenses, and succession duties? The important provisions of the will to be carried into effect are those which confer benefits upon the life-tenants and the remaindermen, including infants and others contingently entitled.

I think it must be assumed that the testator intended that neither the life-tenants on the one hand nor the remaindermen on the other should benefit at the expense of the others and that he desired his trustees to carry out that intention. If in order to do that it is necessary to apply the rule in *Howe v. Lord Dartmouth*, then I think I am bound to hold that he intended his trustees to comply with the rule. There is nothing in the material before me to shew whether or not, either at the date of the will or at the date of his death, the testator had any such securities as are authorised for trustees. It is perfectly fair to construe the language of para. (a) as a direction to convert such part of his estate as might not at his death be in the form of authorised investments.

Even upon the very language of the paragraph in question I am unable to give it any such restricted meaning as that pressed upon me by counsel for the trustees.

Quite apart from that, I do not think that the method of construction pressed upon me is a safe or proper one. Assuming that the direction to convert bears the limited meaning suggested by the trustees, is it not safer to assume that the testator made it *ex abundanti cautela* than that he intended to modify the duties which the law imposed upon his trustees for the impartial protection of all the beneficiaries under his will? Testators frequently insert directions in their wills which are quite unnecessary. It is, in my judgment, improper merely because of some such unnecessary direction to deduce an implied intention that something else is

not to be done, unless that implication is necessary in order to give effect to the express direction itself.

The words of para. (a) are not sufficient, in my opinion, to carry with them any such implication as that suggested. There is nothing else in the will to support the suggestion, and it would be unsafe to assume that the testator really intended by para. (a) that all of his estate remaining, after the payment of debts, expenses and succession duties, *must* be retained in *specie* until the period of distribution. No such implication is required to give effect to para. (a).

I find myself forced to the conclusion that it is the duty of the administrators to deal with the assets of the estate and to convert and re-invest them according to law.

The order will therefore declare that para. (a) of the will does not direct or permit the administrators to retain or hold any part of the estate, other than the residence, the furniture and the motor-cars, in any other form of investment than such as are authorised by law for trustees.

The motion also raises a minor matter for the opinion of the Court. Part of the estate consisted of certain shares in Famous Players Canadian Corporation Limited. Under some arrangement the shares of that company became exchangeable for shares of another company called Famous Players Lasky Corporation, and the administrators made the exchange of the estate's shares under this arrangement. I am asked to approve of this. No such exchange would be justified as a permanent investment, unless authorised by the will, but I think that, except for the restricted powers of the administrators, it was a wise and prudent business transaction. But it must be treated as a mere step towards the complete conversion of this item of the estate in accordance with the foregoing judgment. The order may contain a provision approving the exchange but upon the condition that the shares shall be duly converted in accordance with the earlier provisions of the order.

The administrators and the Official Guardian are entitled to their costs out of the estate, those of the administrators as between solicitor and client. I shall fix them if the parties prefer it and will give me some idea of what the amounts ought to be.

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[LOGIE, J.]

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July 5.

Nuisance—Blasting Operations—Injury to Buildings on Adjoining Lands—Public Work—Statutory Authority—Subcontractor under Contractor with Crown—Department of Railways and Canals Act, secs. 8, 9, 10—Public Works Act, sec. 9—Expropriation Act, sec. 8—Sanction of Parliament for Use of Dynamite—Exceptional Circumstance—Vibration and Damage from Falling Stones—Negligence—Loss of Business—Nominal Damages.

The defendant company was a sub-contractor under the R. company, who had a contract with his Majesty the King, represented by the Minister of Railways and Canals for Canada, for the construction of a section of the Welland Canal and of a weir, immediately adjoining the plaintiff's store and house. The whole of the plaintiff's property had been expropriated originally, but only a part, not covered by his buildings, was retained by the Crown. In the course of its operations, the defendant company, by blasting with dynamite, caused injury to some of the plaintiff's buildings; and this action was brought for damages.

The Department of Railways and Canals Act, R.S.C. 1927, ch. 171, sec. 9, gives the Minister of Railways and Canals general authority to direct the construction of all railways and canals, and of all other works appertaining or incident thereto, provided (sec. 10) that parliamentary sanction for the expenditure has been obtained, which was the case here: sec. 8 of ch. 171 and sec. 9 of the Public Works Act, R.S.C. 1927, ch. 166.

While the defendant company had, by virtue of these statutory provisions and its contract with the head contractor, the right to construct the weir, it was only a permissive right or a conditional authority. If Parliamentary sanctions the use of a particular means for a given purpose, that sanction carries with it the consequence that the use of the means itself for that purpose is not a proceeding for which an action will lie independent of negligence.

Here, Parliament did not sanction the use of a particular means—dynamite—for the given purpose of the construction of the canal—even if it was from the contractors' standpoint reasonably necessary; nor was the use of dynamite necessarily incidental to the exercise of the statutory powers given by the statutes mentioned or by the Expropriation Act, R.S.C. 1927, ch. 64. The implication from sec. 8 of the latter Act is that the use of dynamite is an exceptional circumstance to be treated in an exceptional way. The contractors failed to obtain an order in council under sec. 8, and that was to their advantage; for, if the statute protects them, they pay no damages except for negligence; but, if they obtain an order in council, they pay whether negligent or not (subsecs. 2 and 3 of sec. 8).

No order in council being obtained, the defendant company using explosives, as it could not shew that the plaintiff's right of action was taken away by the statute itself, was liable for vibration and damage from falling stones, under the rule in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, applied in *Hoare & Co. v. McAlpine*, [1913] 1 Ch. 167, to a nuisance created by vibration.

The loss of business or profits is not a matter for compensation under the Expropriation Act, but of damages for trespass. There was an absolute duty on the part of the defendant company to prevent the escape of stones from the land which it occupied into that of its neighbours, irrespective of negligence. The loss of customers or pro-

fits arises directly from the tort of the defendant company, and is the natural and probable result of the blasting operations. The damages for injury to the buildings were assessed at a substantial sum, and a nominal sum was allowed for the loss of business.

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ACTION for damages for injury caused to certain structures upon the plaintiff's lands by blasting operations of the defendant company upon adjacent lands.

June 16. The action was tried before LOGIE, J., without a jury, at Welland.

Murton A. Seymour, for the plaintiff.

R. B. Law, for the defendant company.

July 5. LOGIE, J.:—The plaintiff carried on a fruit and vegetable business, retail and wholesale, as well as an exporting business, in the village of Humberstone, in the county of Welland, and the defendant company was a sub-contractor under A. W. Robertson Ltd., who had a contract with his Majesty the King, represented therein by the Minister of Railways and Canals for Canada, for section 8 of the Welland Canal and for the weir east of the plaintiff's store and house in Humberstone.

The whole of the plaintiff's property had been expropriated originally, but only a part, not covered by the plaintiff's buildings, was retained by the Crown.

In the course of its operations, the defendant company did cause damage by blasting to some of the structures erected on the plaintiff's lands, which immediately adjoin the location of the weir on the west.

The defendant company commenced blasting operations on the 29th January, 1930, and finished on the 4th April, 1930. It alleges that there was no practical way of taking out the large quantity of rock required to be excavated to construct the weir in question except by the use of dynamite or other explosive, that there was no practical method known to engineers or contractors of abating the vibration caused by the explosives, and that it was impossible to prevent loose stones on the surface of the rock flying through the air for a short distance.

The defence therefore is that, while the blasting operations of the defendant company constituted an actionable nuisance, and the defendant company would otherwise be liable for any damage peculiarly sustained by the plaintiff, as distinguished from the general inconvenience that he and the public suffered from the defendant company's operations, it could and did bring itself within the recognised rule that, the Legislature having directed

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or authorised the doing of the particular work in question, anything impliedly authorised in the doing of it could not be wrongful, and no action would lie for any damage resulting from doing it, if it was done without negligence, and that the defendant company was not negligent, but on the contrary exercised reasonable precautions in that it used reduced charges of dynamite; and for that counsel for the defendant company cites a long series of cases, commencing with *Rex v. Pease* (1832), 4 B. & Ad. 30, and such cases as *Vaughan v. Taff Vale Railway Co.* (1860), 5 H. & N. 679; *Hammersmith etc. Railway Co. v. Brand* (1869), L.R. 4 H.L. 171; *Canadian Pacific Railway Co. v. Roy*, [1902] A.C. 220; and *Guelph Worsted Spinning Co. v. City of Guelph* (1914), 30 O.L.R. 466, in our own Court.

It appears that there is no direct statutory authority for the construction of the new Welland Ship Canal as such, but it is beyond question that there is abundant statutory authority for its construction as a public work. The Department of Railways and Canals Act, R.S.C. 1927, ch. 171, sec. 9, gives the Minister of Railways and Canals general authority to direct the construction, maintenance, and repair of all railways and canals, and of all other works appertaining or incident thereto, provided (sec. 10) that parliamentary sanction for the expenditure has been obtained; and that this sanction has been obtained there can be no question. To take a single instance, item 110, schedule A of the Appropriations Act, No. 6, 1926-27, 17 Geo. V. ch. 76, p. 355, appropriates \$14,500,000 for the construction of the Welland Ship Canal, and this is typical of many other items to be found throughout the years during which the canal was building; and, if further authority were needed, the powers of the Minister of Public Works are delegated to the Minister of Railways and Canals by sec. 8 of ch. 171, and these are found in sec. 9 of the Public Works Act, R.S.C. 1927, ch. 166.

Now, while the defendant company had, by virtue of the above legislation and its contract with the head contractor, the right to construct the weir, it was only a permissive right or a conditional authority, and not such a right as that described by Lord Blackburn in *Metropolitan Asylum District Managers v. Hill* (1881), 6 App. Cas. 193, 203, as follows: "Where the Legislature directs that a thing shall at all events be done, the doing of which, if not authorised by the Legislature, would entitle any one to an action, the right of action is taken away;" for, as the Court said in *Vaughan v. Taff Vale Railway Co.*, *supra*, if the Legislature sanctions *the use of a particular means for a given purpose*, that sanction carries with it this consequence, namely, that the use of the

means itself for that purpose is not a proceeding for which an action will lie independent of negligence.

Or, as was said by Lord Sumner in *Quebec Railway Light Heat and Power Co. v. Vandry*, [1920] A.C. 662, 679, 680, "Such powers are not in themselves charters to commit torts and to damage third persons at large, but that which is *necessarily incidental* to the exercise of the statutory authority is held to have been authorised by implication."

Now, the Legislature did not sanction the use of a particular means, viz., dynamite, for the given purpose of the construction of the canal—even if under the circumstances it was from the contractors' standpoint reasonably necessary. Nor was the use of dynamite "necessarily incidental" to the exercise of "the statutory powers" given by the Public Works Act and the Department of Railways and Canals Act, or by the Expropriation Act, R.S.C. 1927, ch. 64.

That this is so is evident when sec. 8 of the latter Act is considered. This section is as follows:—

"In any case where his Majesty has contracted with any person, whether corporation or individual, for the construction or execution of any public work, or where by direction of the Governor in Council, or of the Minister within the scope of his powers, any officer, employee or agent of his Majesty is charged with the construction or execution of any public work, if in the opinion of the Governor in Council it be necessary or expedient that any material, wherever situate, which is required to be excavated or removed by blasting, or by the use of explosive, the Governor in Council may authorise the work to be performed in that manner, notwithstanding that the blasting or explosions may cause damage to or may injuriously affect lands, buildings or property or the prosecution of any industry or work situate in the vicinity of the works or which may be thereby affected."

The clear implication is that the use of dynamite is an exceptional circumstance to be treated in an exceptional way. And the contractors' interest in failing to obtain an order in council is also clear. If the statute protects them they pay no damages except for negligence; but, if they obtain an order in council, they pay whether negligent or not (subsecs. 2 and 3 of sec. 8).

No order in council was passed. In my opinion, if no order in council is obtained, the contractor using explosives, unless he can shew that the plaintiff's rights of action are taken away by the statute itself, is liable for vibration and other damage from falling stones, under the rule in *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330. This rule as explained in *National Telephone v. Baker*,

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Logie, J. [1893] 2 Ch. 186, 199, and *Attorney-General v. Cory Bros. & Co.*,
 1930. [1921] 1 A.C. 521, 539, was applied to a nuisance created by
 vibration causing damage to an old house in driving piles: *Hoare*
& Co. v. McAlpine, [1913] 1 Ch. 167.

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The defendant company, then, is liable for damages occasioned by the escape of vibrations and by the falling of loose stones on to the buildings on the property and may also be liable for the plaintiff's loss of business.

I assess the plaintiff's damages for injury to his buildings, accepting the evidence of George Cramer in preference to the evidence of Gordon Bell and James Ginter, at \$1,040.

The case is somewhat more difficult when one reaches the consideration of the plaintiff's loss of business. By the Expropriation Act, sec. 23, the compensation-money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property. The principle of *Beckett v. Midland Railway Co.* (1867), L.R. 3 C.P. 182, explaining the judgment in *Ricket v. Metropolitan Railway Co.* (1867), L.R. 2 H.L. 175, is that the damage or loss suffered by the plaintiff must be an injury to land irrespective of the use to which it is put, and an injury to trade is not to be considered in so assessing compensation.

If I am right in my construction of the Expropriation Act, the loss of business or profits is not however a matter of compensation thereunder, but is a matter of damages for trespass. There was an absolute duty of the defendant company to prevent the escape of stones from the land which it occupied into that of its neighbours, irrespective of negligence, and no matter how careful it might have been to prevent it. The defendant company in this respect is the insurer of its neighbours against all harm so resulting.

I think the loss of customers or profits arises naturally and directly from the tort of the defendant company, and is the natural and probable result of the blasting operations.

The difficulty on the plaintiff's part was to prove it, and he has failed to furnish sufficient evidence upon which I could assess these damages. He kept no proper books of account. His wholesale and export business has not decreased. Such loss as did occur in his retail business, if it occurred, occurred during the months of January, February, March, and April, and might be attributed to the fact that, previous to the commencement of the work, his store was on the north side of a principal artery or traffic street immediately west of the main bridge crossing the old canal. This

bridge was removed and a temporary bridge erected in a different location, and his store was left in a cul-de-sac of what became in essence a back street. Regardless of the fact that blasting operations occasionally took place, it is natural to draw the inference that his custom would have fallen off very considerably for that reason alone, and then again, all about the site of his store the location was obstructed with machinery and the roadway itself was in a general state of disrepair. In this connection it is to be noted that no blasting was done until the 29th January, and yet in that month, on the plaintiff's evidence, his sales decreased from \$1,537 to \$606. This indicates very clearly that the decrease in that month was not due to the blasting alone, but was probably in part due to the stoppage of through traffic and the general condition of things in and about the canal, and this aspect is further emphasised by the fact that when he moved to a point opposite the approach of the temporary bridge his sales picked up. Again, although both the plaintiff and his daughter stated in evidence that they knew each individual customer, only one witness, Mrs. Black, was produced to swear that she was afraid to go to the store by reason of the blasting. There was, in fact, so far as the evidence goes, no actual physical danger, although there might have been inconvenience had she arrived when the flag-men placed by the defendant company were out with their flags. I allow, therefore, a nominal sum of \$100 for the loss of business; but, if the plaintiff is not satisfied with this, he may have a reference at his own risk, he to elect within 15 days of the date of this judgment.

There will be judgment, therefore, for the plaintiff for \$1,140 and costs.

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[RANEY, J.]

RUTTAN v. THE KING.

1930.

July 16,

Highway—Non-repair of Government Highway—Injury to Passenger in Motor-vehicle and Damage to Vehicle—Negligence—Highway in Course of Repair—Excavation—Highway Improvement Act, R.S.O. 1927, ch. 54, sec. 81—"Substantial Barricade"—Notices—Insufficiency of as Compliance with Act—Disregard by Driver of Vehicle—Apportionment of Fault—Responsibility of Passenger.

The plaintiffs, father and son, were driving in the son's motor-vehicle upon a Government highway, when they ran into an excavation that had been made in the highway by B., a contractor with the Department of Highways. The son was driving and the father was his passenger. The father was injured and the vehicle damaged. When the work of excavation was begun, a few days before the accident,

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B. placed two signs on the right hand side of the road, "Drive slowly, men at work," and "Closed to traffic." These signs were at some distance from the excavation. On the day before the accident, the road-superintendent put up a kind of barricade, with a red lantern and a detour-sign, at a place where the roads fork. The barricade consisted of a board extending about half-way across the travelled portion of the highway, supported at one end by a telephone pole and at the other by an iron rod set into the road:—

Held, in an action for damages for the injuries sustained, that the barrier was not a "substantial barricade" within the meaning of sec. 81 of the Highway Improvement Act, R.S.O. 1927, ch. 54; and the effect of leaving a part of the highway clear was an invitation to travellers to enter, with a warning to be careful; and therefore the conditions for making the closing of the road effective were not complied with and the action was not barred by sec. 81.

Held, however, that the son was negligent in driving past the barrier such as it was.

The fault was apportioned 50 per cent. to the contractor and 50 per cent. to the plaintiffs.

The Department was admittedly liable for the fault of the contractor; and the father as a passenger must share in his son's responsibility. *Gauley v. Canadian Pacific Railway Co.* (1930), 65 O.L.R. 477, followed.

ACTION by George Ruttan and Canniff A. Ruttan, father and son, against the Crown (Ontario Department of Highways) for damages suffered by reason of an accident upon a Government highway. Charles V. Billie, a contractor with the Department, was brought in by the defendant as a third party.

The action was tried before RANEY, J., without a jury, at Belleville.

R. D. Ponton, K.C., for the plaintiffs.

Erichsen Brown, K.C., for the defendant.

C. A. Payne, for the third party.

July 16. RANEY, J.:—The plaintiffs are father and son. On the night of the 8th June, 1929, they were driving on the highway, in the son's automobile, a couple of miles west of the village of Foxboro, when they ran into an excavation that had been made by a steam shovel operated by the third party, Billie, a contractor with the Department of Highways. The son was driving and the father was his passenger. The father suffered serious injuries and the car was damaged. At the close of the evidence, I found that the contractor was negligent in not erecting a barricade with red lights at an appropriate distance from the excavation, to protect traffic approaching from the east. I also found that Canniff Ruttan was negligent in driving past the partial barricade with red lights and detour sign at Foxboro. I reserved the question as to whether the road had been closed to traffic before the accident, within the meaning of sec. 81 of the Highway Improvement Act, R.S.O. 1927, ch. 54, subsec. 1 of which provides that:—

"While the construction, repair or improvement of any road to which this Act applies is in progress, the road superintendent, or any person authorised by him, may close the highway or any portion thereof to traffic for such time as he may deem necessary and subject to the provisions hereinafter contained any person using a highway so closed shall do so at his own risk and shall not have a right to recovery of damages in case of accident or injury."

Subsection 2 provides for alternative routes.

Subsection 3 provides for the erection of barricades and detour signs, and reads:—

"The engineer or road-superintendent or the person authorised by him shall upon closing a highway or portion thereof protect the same by erecting or causing to be erected at each end of the highway so closed and where the alternative route deviates therefrom, a substantial barricade upon which shall be exposed and kept burning continuously from sunset until dawn, a red light, and at such points shall put up a detour sign indicating the alternative route and containing a notice of closing the highway for traffic."

Subsection 4 provides penalties to be imposed on any engineer or road superintendent who neglects to erect barricades, etc.

The question is whether the plaintiffs are precluded from recovering in this action by the language of subsec. 1 of sec. 81.

The plaintiffs' right to recover is not taken away unless all the provisions of subsec. 3 have been complied with. Those provisions are:—

(1) The closing must be under authority of the engineer or superintendent, and

(2) The closing must be evidenced and advertised to the travelling public by (a) "a substantial barricade," (b) a red light at night time, (c) a detour sign, (d) a notice closing the highway for traffic.

The contractor had commenced the work of excavation at the point in question on the 3rd June, and had then placed two signs on the right side of the road leading from Foxboro, one of which read, "Drive slowly, men at work," and the other, "Closed to traffic." One of these signs was at a point about 200 feet towards Foxboro from the excavation, and the other about 75 feet farther away. They were apparently put up by the contractor of his own motion, and were in no sense a compliance with the requirements of the section. Besides, the one contradicted the other—if the road was closed to traffic, why a notice to drive slowly?

Then, on the 7th June, Wright, the road-superintendent, put up a barricade, such as it was, with a red lantern and a detour-sign

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at Foxboro, where the roads fork. The barricade consisted of a board extending about half way across the travelled part of the highway from the north side, supported at one end by a telephone pole, and at the other by an iron rod set into the road. Later on, the board carried the notice "Closed to traffic," but I am not satisfied on the evidence that that notice was put up on the 7th June or was there at the time of the accident on the 8th.

Even if the notice had been there at the time of the accident, this barrier was not, in my opinion, a compliance with the section which calls for "a substantial barricade," not a partial barricade. The effect of leaving a part of the highway clear was an invitation to travellers to enter, but to be careful. It was a mere gesture. The statute does not contemplate a gesture; it contemplates an effective physical obstruction.

Moreover, in practice, the road had been kept open to traffic during Billie's operations from the 3rd June and continued open to traffic after the accident.

I think, therefore, that the conditions to make the closing of the road effective were not complied with and that the action is not barred by sec. 81.

At the trial I assessed the father's damages at \$2,500 and the son's at \$100, and apportioned the fault 50 per cent. to the contractor and 50 per cent. to Canniff Ruttan. But the father must share in the son's responsibility: *Gauley v. Canadian Pacific Railway Co.* (1930), 65 O.L.R. 477.

Mr. Brown conceded that, if the contractor was liable, the Department was also liable, and it was agreed between counsel for the Department and counsel for the third party that the trial of the issue as between them should be deferred.

There will be judgment for the plaintiff George Ruttan for \$1,250 and for Canniff Ruttan for \$50, with the costs of the action.

[RANEY, J.]

BOYD v. SMITH.

1930.

July 8.

Negligence—Motor-vehicle upon Highway—Injury to Child—Negligence of Driver—Vehicle in Possession of Driver without Consent of Owner—Non-liability of Owner—Highway Traffic Act, R.S.O. 1927, ch. 251, sec. 41—Liability of Employer of Driver—Vehicle being Used in Employer's Business.

The defendant S., without the consent of the defendant C., who was S.'s brother-in-law and was absent at the time, took C.'s motor-car and operated it upon the streets of a city, for a purpose connected with the business of the defendant company, by which both C. and S. were employed. In doing so, S., by admitted negligence, ran down and severely injured a child. This happened in the summer of 1928, when sec. 41 of the Highway Traffic Act, as it appeared in R.S.O. 1927, ch. 251, was in force. This action was brought by the child and her father to recover damages for negligence:—

Held, that, the motor-car being, at the time of the accident, in possession of a person other than the owner or his chauffeur, without the owner's consent, the action failed as against C.

But *held*, that, S. being in the employment of the company and upon its business when he ran the child down, the company as master was liable for the wrong of the servant committed in the course of the service and for the master's benefit, though no express command or privity of the master was proved.

Lloyd v. Grace Smith & Co., [1912] A.C. 716, and *Governor and Company of Gentlemen Adventurers of England v. Vaillancourt*, [1923] S.C.R. 414, followed.

Goodman v. Kennell (1827), 3 C. & P. 167, and *Stretton v. City of Toronto* (1887), 13 O.R. 139, considered.

AN action brought on behalf of an infant by her father, as next friend and as a plaintiff in his own behalf, for damages for injury sustained by the infant when run down upon a street in the city of Toronto by a motor-car owned by the defendant Carter and driven by the defendant Smith, who was at the time of the accident in the employment of the defendant the Permanent Records Corporation Ltd., and for expense and loss incurred by the father in consequence of the injury to the infant.

The action was tried before RANEY, J., without a jury, at a Toronto sittings.

J. R. Cartwright, for the plaintiff.

Gideon Grant, K.C., for the defendants Carter and the Permanent Records Corporation Ltd.

No one appeared for the defendant Smith.

July 8. RANEY, J.:—The infant plaintiff suffered serious injury when she was run down by the defendant Smith as she was crossing the street to enter the yard of the public school in Huron-street, Toronto, where she was a pupil.

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The accident occurred on the 5th June, 1928, and the child has spent a large part of her time since then in a hospital, where, up to the time of the trial, five major operations had been performed on her, besides a number of minor operations. As a result of the accident she will be an invalid for life. Already her father, who is also a plaintiff, has expended moneys or incurred liabilities aggregating more than \$2,500 for hospital and medical charges. Nor is there any question of the negligence of the defendant Smith; he put in no defence, so that, as against him, it is merely an assessment of damages. The real trial was as against the defendants Carter and the Permanent Records Corporation Ltd.

The plaintiffs' claim against the defendant Carter is as the owner of the automobile, and against the company as the employer of Smith at the time of the accident.

Smith and Carter are brothers-in-law, Carter's wife being Smith's sister. In 1928 the two families occupied apartments in the same house. Carter is the manager of the defendant company in whose employment Smith was. In the summer of 1928, Carter went to England, leaving Smith in charge of the company's operations; leaving his automobile in his garage at the apartment-house, and designating a driver whom Mrs. Carter was to employ when she had occasion to use the car. The keys of the garage and of the automobile were kept by Mrs. Carter hanging in her kitchen, and it was Smith's practice while Carter was in England to use the car when he pleased, taking the keys from where they were kept by Mrs. Carter. She appears to have protested against Smith's use of the car, but not effectively, and she did not put the keys away.

On the day of the accident, a telephone message came to Mrs. Carter from a customer of the company, after Smith had left the company's office to go to his home for luncheon. When Smith arrived at his home, Mrs. Carter told him of the message, and Smith took the automobile to make a call on the customer with reference to the subject of the message, which had to do with the business of the company.

I am satisfied that Mrs. Carter knew that Smith was taking the automobile and that she did not protest against Smith's use of it on that occasion. It was while Smith was proceeding to call upon the company's customer that he ran the child down.

The plaintiffs' claim as against the defendant Carter turns on sec. 41 of the Highway Traffic Act as it stood in 1928. That section made the owner of a motor-vehicle responsible for an accident on the highway unless at the time of the accident the motor-

vehicle was in possession of some person other than the owner or his chauffeur "without the owner's consent."

There is nothing in the evidence that would justify a finding that, before leaving for England, Carter had either consented to Smith's use of the car during his absence, or had authorised his wife to permit Smith to drive the car. As against Carter, the action therefore fails.

The company's liability to the plaintiffs depends upon the answer to the question: Was Smith in the employment of the company and on its business when he ran the child down?

There is no doubt that the master is answerable for every wrong of the servant "committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved:" *per* Lord Macnaghten in *Lloyd v. Grace Smith & Co.*, [1912] A.C. 716, at p. 732. In the earlier case of *Bayley v. Manchester Sheffield and Lincolnshire Railway Co.* (1872), L.R. 7 C.P. 415, at p. 420, Mr. Justice Willes had stated the doctrine in these terms: "A person who puts another in his place to do a class of acts in his absence, necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so intrusted either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not from caprice of the servant, but in the course of the employment."

In the 7th edition of *Smith's Master and Servant* (1922) the authorities are summarised at p. 209, in this paragraph: "Though it has been thought that the doctrine of *respondeat superior* has been extended too far, it is now indisputable that . . . a master is responsible *civiliter* to third persons for any act done by his servant, provided it be done in the course of his employment, whether the act be one of omission or commission, whether negligent, fraudulent, or deceitful, even if it be done in violation of his master's orders, and even if it be an act of positive malfeasance or misconduct, and though it should amount to a criminal offence."

There is no doubt, I suppose, that if Smith, in the exercise of his judgment, had thought fit to hire an automobile at the expense of the company to enable him the more expeditiously to execute his errand, and the accident had happened as it did, the company would have been liable. What difference does it make that Smith, in the exercise of his judgment, took the automobile of his brother-in-law, the manager of the company, to assist him in executing his errand for the company?

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I am pressed by *Goodman v. Kennell* (1827), 3 C. & P. 167, and *Stretton v. City of Toronto* (1887), 13 O.R. 139, in our own Court. In the former case, now more than a century old, a master sent his servant on an errand without providing him with a horse, and the servant took a horse belonging to another man and rode it in the doing of the errand, and an injury was caused by the servant to a third person. It was held that the master was not liable in damages to the third person. In the Ontario case, a servant of the defendant was sent by the superintendent of the defendant upon an errand, and without the knowledge or consent of the defendant wrongfully took possession of a horse and buggy belonging to the superintendent, and therewith ran the plaintiff down. It was held, following *Goodman v. Kennell*, that the defendant was not liable.

It will be sufficient to say that to the extent to which these cases cannot be distinguished from the authorities summarised in the text-books, to that extent they are not binding authorities. As was remarked by Mr. Justice Duff in *Governor and Company of Gentlemen Adventurers of England v. Vaillancourt*, [1923] S.C.R. 414, 416, "If the thing done belongs to the kind of work which the servant is employed to perform or the class of things falling within the performance of his duties, then by the plain words of the text responsibility rests upon the employer. Whether that is so or not in a particular case must, I think, always be in substance a question of fact, and although in cases lying near the border-line decisions on analogous states of fact may be valuable as illustrations, it is not, I think, the rule itself being clear, a proper use of authority to refer to such decisions for the purpose of narrowing or enlarging the limits of the rule."

The last mentioned case is indeed the most recent illustration in our own Courts of the doctrine of *respondeat superior*. It arose under art. 1054 of the Civil Code of Quebec, which provides that "Masters and employers are responsible for the damage caused by their servavnts and workmen in the performance of their work for which they are employed." The facts were that the appellant company, known as the Hudson Bay Company, maintained a trading post in the far northern part of the Province of Quebec. The post was in charge of one Wilson as manager, with two other employees of the company under his control, Vaillancourt as general helper, and his mother as housekeeper, all three living together. One morning Wilson came out of his room, half-naked and drunk, to inquire about some noise he had heard in the upper part of the building. Vaillancourt, coming down, saw Wilson and, knowing his mother was near, asked him to go back to his room

and get dressed. A few minutes later, Vaillancourt being in the kitchen, Wilson went there and shot him, injuring his leg so severely that it had to be amputated. It was held (Duff and Anglin, JJ., dissenting) that the company was liable under the article of the Civil Code above quoted, as the damages were caused by Wilson "in the performance of the work for which (he) was employed."

This case goes, it seems to me, a good deal farther than the Court is asked to go in the present case.

There will be judgment for the child for \$10,000, to be paid into court, and for the father for \$5,000, against the defendant Smith and the company, with costs, and the action will be dismissed as against the defendant Carter without costs.

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[ORDE, J.A.]

LUCAS V. COUPAL.

1930.

July 24.

Negligence—Motor-vehicles upon Highway—Collision at Intersection of Roads in Province of Quebec—Plaintiffs Resident in Quebec, but Defendant in Ontario—Infant Plaintiffs, Suing by Next Friend—Status of—Quebec Law—Claim of Adult Plaintiff—Negligence—Contributory Negligence.

An action was brought in the Supreme Court of Ontario by four infants, suing by their mother as next friend, and also by the mother on her own behalf, to recover damages arising from the collision of the plaintiffs' motor-car, driven by one of the infant plaintiffs, with the defendant's motor-car, driven by himself, upon a highway in the Province of Quebec. The plaintiffs all resided in Quebec; the defendant in Ontario:—

Held, that the infant plaintiffs had no status to enforce, either in their own names or through the medium of a next friend, a right of action which depended wholly upon Quebec law, and which by that law can be enforced only by a tutor, duly appointed under that law, suing in his own name in that capacity.

By the law of Quebec, "actions belonging to a minor are brought in the name of his tutor;" and, when such an action is brought, the minor is not a party to it, the right of action being vested in the tutor, to whom the fruits of it are paid, and who holds them in his own name for the minor until the latter's majority. The question is one of status and not of procedure.

In the case at bar there was neither residence within the jurisdiction to give the Court power to deal with the infants' rights, nor any cause giving a right of action under the law of Ontario.

Scott v. Niagara Navigation Co. (1893), 15 P.R. 409, 455, *Roberts v. Coughlin* (1898), 18 P.R. 94, *McBain v. Waterloo Manufacturing Co.* (1904), 8 O.L.R. 620 and *Stuart v. Baldwin* (1877), 41 U.C.R. 446, distinguished.

Quære, as to the soundness of the ruling in the *McBain* case that one who resides beyond the jurisdiction may be a next friend if he gives security for costs.

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The collision occurred at the intersection of a Quebec provincial highway by a cross-road. The plaintiffs were proceeding south-westerly along the cross-road, and at the intersection their car was struck by the defendant's car proceeding south-easterly along the provincial highway. The defendant was approaching the intersection at a fairly high rate of speed:—

Held, upon the evidence, that he could have seen and ought to have seen the plaintiffs' car entering the intersection in ample time to have stopped his own car or to have moderated his speed and so avoided the collision—he was negligent in failing to keep a proper lookout for intersecting traffic and in not having his car under sufficient control at the speed he was going to enable him to stop or otherwise avoid the collision.

The driver of the plaintiffs' car was negligent because of her failure to observe the defendant's car approaching, but her negligence was not the sole cause of the collision—it only contributed to it.

In respect of the claim of the adult plaintiff, the contributory negligence was of no consequence, unless the adult plaintiff was also guilty of it. It was argued that all the other occupants of the car were guilty of contributory negligence because the driver, a girl of 17, was not entitled by Quebec law to drive a car and was not even eligible for a driver's licence:—

Held, that, there being no evidence that apart from her age she was not competent to drive a car, mere knowledge of the fact that she had no authority to drive a car could not be imputed as negligence to the others; nor could her contributory negligence be imputed to the adult plaintiff; and the latter was entitled to recover from the defendant the full amount of her damages as assessed.

THIS action was brought by four infants, who sued by their mother as their next friend, and also by the mother on her own behalf, for damages arising from the collision of two motor-cars upon a highway.

May 12. The action was tried before ORDE, J.A., without a jury, at Ottawa.

G. F. Henderson, K.C., for the plaintiffs.

Austin O'Connor, for the defendant.

July 24. ORDE, J.A.:—The plaintiffs all reside in the Province of Quebec, and the collision from which the cause of action springs occurred in that Province. The defendant resides in Ontario.

The difficulties necessarily inherent in any case where an Ontario court must deal with a question of Quebec law as a question of fact are here increased by one of the defences, namely, that the infant plaintiffs have no status to enforce, either in their own names or through the medium of a next friend, a right of action which depends wholly upon Quebec law, and which by that law can be enforced only by a tutor, duly appointed under that law, suing in his own name in that capacity.

I have not been referred to, nor have I found, any authority directly in point. But, after considering the evidence of Mr. Alexander Taché and of Mr. T. P. Foran, K.C., both of the Province

of Quebec, called respectively by the defendant and the plaintiffs, and the memoranda which at my request they subsequently put in and the authorities they quoted, all of which I have treated as part of their evidence, I have come to the conclusion that this branch of the defence is well-founded. The plaintiffs say the question is merely one of procedure and as such is governed by the practice in our own courts. With this I cannot agree.

Under the law of this Province, when something arises which gives to an infant a right of action, that right is his own. He must himself come to the Court to enforce it, and the action is brought in his name. If he succeeds, the judgment is in his favour and its fruits are his. But in order to protect the defendant in the matter of costs, the infant plaintiff must have associated with him in the action an adult, who ought to be within the jurisdiction, as his next friend. The next friend is, however, not a party, though liable for costs; and, while he has in a sense some control over the conduct of the action, in that he instructs his and the infant's solicitor, he is not really *dominus litis*, for he has no power to bind the infant plaintiff by compromising or settling the action. Once the action is launched, the infant's rights are in the hands of the Court, and no disposition of the action binding upon the infant can be made without the Court's approval. And the Court usually takes possession of or otherwise disposes of the moneys recovered by the judgment for the infant's benefit. The intervention of a next friend under our practice is merely a matter of procedure. He does not represent the infant except in a very limited sense. It is clear that no interest in the infant's cause of action or in the fruits thereof is at any time vested in the next friend.

It is not necessary to discuss in all its aspects the relationship of a minor (as an infant under 21 years of age is called in Quebec) and his tutor, in its bearing upon transactions affecting the minor's property under the laws of Quebec. With a few exceptions a minor is powerless to deal with his property at all and it must be disposed of through the medium of a tutor, who must be duly appointed in the manner and with the formalities required by the provisions of the Civil Code of that Province. When appointed the tutor takes possession of the minor's property and administers it during his minority. And it is clear that by the provisions of art. 304 of the Code "actions belonging to a minor are brought in the name of his tutor." When such an action is brought the minor is not a party to it, and, as I understand from the evidence, the right of action is vested in the tutor, to whom the fruits of it are paid, and who holds them in his own name for the minor until the latter's majority. The question there is one of status and not of procedure at all.

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This being so, how can these infant plaintiffs seek to enforce in Ontario in their own names a cause of action arising in Quebec, which by the law of that Province is not vested in them at all but in their tutor?

It may be argued that the tutor, even when suing in Quebec, is enforcing his minor's rights and not his own. That is true in a sense, but only in the same sense that any trustee, an executor for example, enforces the rights of his *cestui que trust* when he must sue in his own name, though in his representative capacity, for the benefit of the *cestui que trust*. The cause of action is vested in the trustee and not the beneficiary.

Suppose judgment were recovered against the defendant in this action and he desired to satisfy it. Would payment into court of the infants' moneys constitute an effective release to the defendant? The infant plaintiffs are beyond the jurisdiction of this Court and are not subject to its control. Nor is the cause of action one over which the Court has jurisdiction except by reason of the defendant's residence in this Province. How can the plaintiffs or an Ontario court grant the defendant an effective release for any moneys which he might pay in respect of the cause of action? Would a judgment here operate as an effective bar to any future action brought by a duly appointed tutor either in Quebec or Ontario?

When an infant's cause of action is determined by a judgment in this Province in an ordinary case, there is a complete merger of the right of action in the judgment, by reason of the Court's jurisdiction either over the rights of the infant because of his residence within the jurisdiction, or over the cause of action because it arose within the jurisdiction, or both. In the present case there is neither residence within the jurisdiction to give the Court any power to deal with the infants' rights, nor any cause giving a right of action under the law of Ontario.

There are three Ontario cases which may appear to have some bearing upon the question. In *Scott v. Niagara Navigation Co.* (1893), 15 P.R. 409, 455, an infant and his father who had resided in the United States came to Ontario to commence an action on behalf of the infant, the father appearing as his next friend. The defendant moved for security for costs but without success, the Court holding in effect that it was not to be presumed that the change of residence to Ontario by the infant and his next friend was not made in good faith. The cause of action presumably arose in this Province, and the defendant's head office must have been here also. *Roberts v. Coughlin* (1898), 18 P.R. 94, was an action for administration launched by an infant who resided

out of the jurisdiction by a next friend who resided within the jurisdiction. An application to compel the infant plaintiff or the next friend to give security for costs was refused. Again, both the defendants and the subject-matter of the action were within the territorial jurisdiction of the Ontario Court. In *McBain v. Waterloo Manufacturing Co.* (1904), 8 O.L.R. 620, both the infant plaintiff and the next friend resided out of Ontario, and the Master in Chambers ordered that either security for costs be given or a friend residing in Ontario be appointed.

In none of these cases was the question of status raised, and it appears to have been assumed that proceeding through the medium of a next friend was proper, as perhaps it was if both cause of action and the defendant were in each case within the territorial jurisdiction of the Ontario Court, as I think is to be gathered from a reading of the cases as reported. The cases are for this reason clearly distinguishable from the present one.

In the *McBain* case the Master in Chambers appears to have thought that a next friend might reside beyond the jurisdiction if security for costs were given. I am not sure that this ruling was sound. It is stated in Daniell's Chancery Practice, 8th ed., p. 101, that a person residing outside the jurisdiction is not eligible as a next friend, and this is apparently accepted as authoritative by the editor of the Annual Practice, 1930, at p. 256. It is not, however, necessary to determine that point here.

Mr. Henderson cited *Stuart v. Baldwin* (1877), 41 U.C.R. 446, and the reference at p. 482 to *Scott v. Seymour* (1862), 1 H. & C. 219. These cases deal with the right to sue a person within the jurisdiction in respect of a cause of action arising out of the jurisdiction. Objection was taken that the right of action could not have been enforced in the country where it arose except after the completion of certain preliminary proceedings. It was held that the objection was to procedure only and that the *lex fori* governed. There appears to have been no doubt that the cause of action in each case was in the plaintiff himself. These cases, in my judgment, have no bearing upon the question of status. If the infant plaintiffs could not sue in Quebec how can they sue here?

As to the claim of the adult plaintiff, while, of course, it would be preferable that the claims of all should be determined by the same tribunal, I suppose I must dispose of it. The collision occurred in the township of Bristol, at a point where the provincial highway from Waltham to Hull is intersected by a cross-road. The plaintiffs were proceeding south-westerly along the cross-road in a motor-car driven by the plaintiff Dorothy Lucas. At the intersection their car was struck by a car proceeding south-easterly along

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the provincial highway, driven by the defendant. I do not intend to review the evidence in full. I find as a fact that the defendant was approaching the intersection at a fairly high rate of speed, that he could have seen and ought to have seen the plaintiffs' car entering the intersection in ample time to have stopped his car or to have moderated his speed and so have avoided the collision. He was negligent in failing to keep a proper lookout for intersecting traffic and in not having his car under sufficient control at the speed he was going to enable him to stop or otherwise avoid the collision.

It is contended by the defendant that, as he had the right of way, it was the duty of the driver of the plaintiffs' car to have allowed him to pass before entering upon the provincial highway. The evidence of the plaintiffs is that their car stopped at the intersection and then proceeded to cross. That was the plaintiffs' right, and I understood from the evidence that the law of Quebec is substantially the same as ours in this regard and that the plaintiffs were under no absolute obligation to wait indefinitely to allow right hand traffic to pass. I cannot agree with the contention of the defendant that any negligence on the part of the driver of the plaintiffs' car was the sole cause of the accident.

But I do agree that she was negligent because of her failure to observe the defendant's car approaching. I do not think a single glance down the highway when she stopped was enough, and she ought to have been on the lookout when she again started her car. This would have enabled her to stop again in time to avoid being struck. I think her neglect in this regard contributed with that of the defendant to cause the collision.

As I am dealing only with the claim of the adult plaintiff, the question of contributory negligence is of no consequence, unless she herself is also guilty. It was argued that all the other occupants of the car were guilty of contributory negligence because the driver, a girl of 17 years of age, was by reason of her age not entitled by Quebec law to drive a car and was not at that age even eligible for a driver's licence. If her negligence was in any way the result of her breach of the provisions of the Quebec Motor-Vehicles Act, there might be something in this contention, but there was no evidence to satisfy me that apart from her age she was not fully competent to drive the car, so that I am unable to see how mere knowledge of the fact that she had no authority to drive a car can be imputed as negligence to the others. Nor was I satisfied from any evidence adduced that under the law of Quebec the contributory negligence of which I think she was guilty can be imputed also to her mother, the adult plaintiff.

I think, therefore, that the adult plaintiff is entitled to recover the full amount of her damages from the defendant.

Those damages fall under two heads. She is out of pocket for medical and nursing expenses in respect of herself and her children and is under obligation to her sister and her brother-in-law for the care of one child for several weeks after the accident. For this she claims \$200, and, as the total amount of her expenditure and liability proved exceeds that sum, she is entitled to it. The evidence as to the extent of her personal injuries is not very satisfactory. She was undoubtedly bruised in the collision and was at the time of the trial in a weak and nervous condition which she and her physician think resulted from the accident. It is not easy to estimate in money the real damages for injuries of this character. The best I can do upon the evidence is to fix them at \$400. This will make her total damage \$600.

There will therefore be judgment as follows:—

1. Declaring that, as the cause of action arose in the Province of Quebec and damages therefor are recoverable only in accordance with the laws of that Province, the infant plaintiffs are not entitled, either in their own names or through the medium of a next friend, to recover in this Province, and that their action must therefore be dismissed; the defendant to be entitled to recover against the adult plaintiff, as the next friend of the infant plaintiffs, one half of the costs incurred by him in defending the action.

2. For the adult plaintiff against the defendant for \$600 and one-half of the total costs incurred by her.

It is to be hoped that now that all the evidence has been adduced, and with my findings of fact before them, the claims of the infant plaintiffs can be satisfactorily settled without resort to further litigation.

[GARROW, J.]

GENDRON V. PROVIDENT ASSURANCE CO.

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August 1.

Insurance (Fire)—House Insured "only while Occupied as a Private Dwelling"—Occupation at Time of Fire by Lessee and other Men all Contributing to Rent—Insurance Act, R.S.O. 1927, ch. 222, sec. 98—Amendment by 19 Geo. V. ch. 53, sec. 12.

An action upon a policy of fire insurance was resisted by the defendant company upon the ground that at the time of the fire the house insured was not occupied as a private dwelling, contrary to a condition of the policy. One of the plaintiffs (G.) let the house to H., who said that he was going to live in it, and G. understood that H. would occupy the house with his wife and family, though

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H. did not say so—he said merely that he wanted a house to live in. At the time of the fire H. had three men living in the house with him. Once a week H.'s wife came in to keep things in order and twice a week the wife of one of the other men did the same. Each of them contributed to the rent, that is, the other men paid their proper shares to H., who in turn paid G. This occupation continued for two months. G. was never in the house while it was so occupied:—

Held, that the house was occupied as a private dwelling; there was nothing in the policy limiting the occupation to one person or one family; and the plaintiffs were entitled to recover upon the policy. *Semble*, apart from the amendment made to sec. 98 of the Ontario Insurance Act in 1929 by 19 Geo. V. ch. 53, sec. 12, which did not become law till after the fire, that the words "only while occupied as a private dwelling" are a limitation upon the thing insured, and would afford a good defence if, in fact, the house was not so occupied at the time of the fire.

AN action upon a policy of fire insurance.

The action was tried by GARROW, J., without a jury, at Barrie. *W. A. Boys, K.C.*, and *W. M. Thompson*, for the plaintiffs. *Gordon Balfour, K.C.*, for the defendant company.

August 1. GARROW, J.:—The plaintiffs other than King are the executors of Jane Gendron, deceased, and the plaintiff King is the mortgagee of the property insured by the defendant company against fire, the property comprising a dwelling house in Penetanguishene, owned by the estate of the deceased, subject to the mortgage held by King, to whom the loss was made payable as his interest might appear.

The policy is for the sum of \$1,000, and while it was in force the building was totally destroyed by fire. Proofs of loss in proper form were, it is admitted, duly submitted, and upon the company's failure or refusal to pay this action was brought. It is resisted solely upon the ground that at the time of the fire the house was not occupied as a private dwelling, contrary to a condition of the policy.

The facts as to the nature of the occupation are shortly as follows. Manson Gendron, the house being vacant at the time, rented the premises to one Hamelin. Gendron did not inquire from Hamelin what he proposed to do with the house, but he was told by Hamelin that he was going to live in it, and Gendron understood that the tenant would occupy the house with his wife and family. Hamelin had lived all his life within a few miles of Penetanguishene, and was apparently known to Gendron.

It appears from Hamelin's evidence that he was employed to draw gravel for certain work then in progress. He did not, so he says, tell Gendron he was going to move his family into the house. He said merely that he wanted a house to live in. At

that time Hamelin did not anticipate having more than one additional man living with him in the house, but later he had three and for a short time four men all living in the house together and engaged on the same job. They cooked their own meals and each man bought his own food. They had two cook-stoves and two iron beds. Once a week Hamelin's wife came over from Perinsville to put things in order, and twice a week the wife of one of the other men did the same. Each of them contributed towards the rent, that is, I understand, paid their proper shares to Hamelin, who in turn paid Gendron. This occupation, which was in the winter season, continued for some two months. Gendron was never in the premises while they were so occupied. The fire occurred while this occupation existed.

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Counsel for the defendant company contends that the words "only while occupied as a private dwelling" are descriptive of and limit the thing insured and are not an unauthorised and ineffective attempt on the part of the company to vary statutory condition number 7. As the law stands at present, since the amendment to the Insurance Act in 1929, nothing contained in the description of the subject-matter of the insurance shall be effective in so far as it is inconsistent with, varies, modifies or avoids any of the statutory conditions. See 19 Geo. V. ch. 53, sec. 12, amending sec. 98 of R.S.O. 1927, ch. 222. This became law a short time after the fire in question and does not apply to the present case, and the cases referred to by Mr. Balfour indicate that, apart from the recent amendment, the words are a limitation upon the thing insured and would afford a good defence if, in fact, the house was not so occupied at the time of the fire. Those cases are *Sun Insurance Office v. Roy*, [1927] S.C.R. 8; *London Assurance Corporation v. Great Northern Transit Co.* (1899), 29 Can. S.C.R. 577; *Ross v. Scottish Union and National Insurance Co.* (1918), 58 Can. S.C.R. 169; *Moffa v. Law Union and Rock Insurance Co.* (1924), 26 O.W.N. 88; and *Cooper v. Toronto Casualty Insurance Co.* (1928), 62 O.L.R. 311.

But, after considering the matter, I am unable to hold that the occupation as described was not that of a private dwelling. Reference was made to dictionary definitions and to similar expressions in other statutes such as the Ontario Temperance Act of 1916, which do not appear to me to be of much assistance. It was also contended that the true description of the use to which the premises were put would be to call it a bunk-house, and there was some evidence that such a risk, properly so called, would not be written at all. I do not agree with this. If Hamelin had lived alone under the same circumstances, his wife visiting him occasionally and he

Garrow, J. sleeping and eating his meals there regularly, it would surely be described as a private dwelling house, and it seems to me to make no difference that three or four other men joined with him in this occupation. As to each of them the house was for the time being his private dwelling house. Suppose half the house had been rented to one family and half to another—would it thereby cease to be occupied as a private dwelling? I think not. There is nothing in the policy limiting the occupation to one person or one family.

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I think, for the reasons mentioned, that the plaintiffs are entitled to succeed. I would find on the evidence that the fair value of the premises destroyed is \$900, and there will be judgment for that amount with costs.

[IN CHAMBERS.]

REX V. WRIGHT.

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1930.
August 1.

Criminal Law—Vagrancy—Common Prostitutes—Evidence—Magistrate's Convictions—Two Charged and Tried together—Substantial Error—Discharge on Habeas Corpus.

Two women were charged jointly before a police magistrate for that within one week last past, at H., they were loose, idle, or disorderly persons, being common vagrants, contrary to the provisions of sec. 238(i) of the Criminal Code. The evidence given before the magistrate by two detectives shewed that these women were seen by them in a city street at about 1.45 a.m.; the detectives inquired of them whether anything was wrong and were told "no." One of the women asked the men to come into the house "for a good time," saying it would only cost them \$3 a piece. The detectives did not accept the invitation. Two days later, at about the same time, the two detectives found the two women at the same place and conversed with them. The conversation was to the same effect, except that the other woman did the talking. The women were thereupon arrested, taken and tried together before the magistrate, and convicted of the offence charged. They were sentenced, and separate warrants of commitment were issued as to each:—

Held, upon the return of writs of *habeas corpus*, that, assuming that the information was sufficient in form to lay a charge under sec. 238(i), it was incumbent upon the Crown to prove: (1) that the accused were common prostitutes; (2) that they wandered in the streets; and (3) that they did not give a satisfactory account of themselves.

The Crown failed to prove that they were common prostitutes—that they were in the habit of having promiscuous sexual intercourse with men.

Even assuming that the evidence as to the invitation given by one of the women on the first occasion was sufficient to justify the conclusion that she was a common prostitute, there was no evidence

that the other woman heard it, and it was not evidence against her. And similarly the words of the latter on the second occasion were not evidence against the former.

It was a substantial error to charge and try the two jointly; if they had been tried separately, there was not evidence to establish the three points above mentioned; and each of them was wrongfully convicted.

Rex v. Jackson (1917), 12 O.W.N. 315, 29 Can. Crim. Cas. 352, and *Rex v. La Chance* (1915), 24 Can. Crim. Cas. 421, followed.

MOTION by the defendants, upon the return of writs of *habeas corpus*, for an order for their discharge from custody under convictions made by the Police Magistrate for the City of Hamilton.

July 3. The motions were heard by GARROW, J., in Chambers.
B. J. Spencer Pitt, for the prisoners.
I. A. Humphries, K.C., for the Crown.

August 1. GARROW, J.:—The two women were charged jointly before the Police Magistrate for the City of Hamilton on an information laid in the following language, “that within one week last past, at Hamilton, in the said county, Edna Parker and Charlotte Wright unlawfully are loose, idle or disorderly persons being common vagrants contrary to the provisions of section 238, paragraph (i), of the Criminal Code.”

The accused pleaded not guilty and were represented by counsel. Neither gave evidence, although each now says she was willing and anxious to testify on her own behalf but was prevented by her then solicitor. After argument both were convicted and sentenced to imprisonment for not less than 6 nor more than 12 months in the Andrew Mercer Reformatory.

The important facts appearing from a perusal of the evidence are as follows. At about 1.45 a.m. on the 16th June, Detectives Hogan and Withim were in the vicinity of Hess and Barton-streets and saw the two accused in company with another woman, who was sitting on the kerb. The detectives thought something was amiss and stopped and made inquiries whether anything was wrong, and were told ‘no.’ Hogan’s story proceeded: “We then had a conversation with these ladies, and one of the two, Charlotte Wright, said, ‘Do you boys want to come in the house?’ I said ‘What for?’ She said: “For a good time. If you got any money it will only cost you \$3 a piece; come into the house.”

The detectives did not accept the invitation, and the matter ended there for the time being. But two days later at about the same time in the morning, “We happened around there again and the two accused were on the same corner.” They were on this occasion in the company of a man, who walked away. On the former occasion Charlotte Wright did the talking and Edna Parker

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Garrow, J. said nothing. On the second occasion this was reversed and Parker said, "You boys looking for a good time?" and "Where are you from?" Withim said, "Oh! we're just in the city from the country." Then she said, "If you boys are looking for a good time just come along with us to the house and have some beer and a little jazz." At the request of the magistrate to explain, the witness then added, quite improperly, I think, but without objection on the part of the accused's counsel, "What she meant by that was to come in the house and have connection with her." Both women were thereupon taken into custody and charged as aforesaid.

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Upon this evidence, which was corroborated by the other detective, the two women were convicted and sentenced, and separate warrants of commitment were issued as to each, much in the language of the charge as laid in the information.

Several points were argued as follows: (1) that there was no right to arrest the prisoners without a warrant; (2) that they should not have been charged and tried together; and (3) that the sentence imposed was illegal and excessive.

Assuming that the information was sufficient in form to lay a charge under sec. 238 (i) of the Code (as to which however see *Rex v. Jackson* (1917), 12 O.W.N. 315, 29 Can. Crim. Cas. 352), it was incumbent upon the Crown to prove: (1) that the accused were common prostitutes; (2) that they wandered in the streets; and (3) that they did not give a satisfactory account of themselves—before they could properly be convicted of being loose, idle or disorderly persons or vagrants.

In my opinion, the Crown failed to prove that these women were common prostitutes, that is that they were in the habit of having promiscuous sexual intercourse with men: *Bedard v. The King* (1916), 26 Can. Crim. Cas. 99; *Rex v. Cardell* (1914), 23 Can. Crim. Cas. 271. And, even assuming that the evidence as to the invitation given by the Wright woman on the first occasion, with the implication involved in the naming of a price for a good time, was sufficient to justify the conclusion that she was a woman of the kind referred to, yet there is no evidence that the other woman heard it, and it was, in my opinion, not evidence against her. And, similarly, the words of the Parker woman upon the second occasion were not, in my view, evidence against the Wright woman. There is in fact some suggestion in the evidence, and this is verified by the affidavit of Wright, that, at the time they were spoken, she was some 20 yards away and out of hearing of what took place. Neither woman was on either occasion asked to give a satisfactory account of herself.

Rex v. Jackson, already referred to, is authority for the state-

ment that, if a woman is caught in the act of soliciting on the street, the necessity for asking her to give an account of herself disappears. In fact it is pointed out that the section does not in so many words require that she be asked to give an account of herself, but merely that she "does not give a satisfactory account of herself." And if by her words and actions she in effect affirmatively gives an account which is not satisfactory, the requirements of the section in this respect are probably met. But the woman Wright gave no account of herself on this occasion, either satisfactory or otherwise, just as on the former occasion the Parker woman gave none. I quite admit that, if it had been proved that a solicitation had been made by one woman on behalf of both, the fact that the other said nothing, although standing by and hearing what passed, would probably be sufficient, the other necessary facts being also proved. But that has not been proved in this case, in my opinion. And as to what was said by the Parker woman on the second occasion, even assuming that the Wright woman did hear it and give a tacit consent to it, I cannot think that the language there used is sufficient to justify a conclusion that the woman making it was a prostitute, and that it amounted to a solicitation to have sexual intercourse. If that is so, then many an innocent but foolish woman is in danger of being summarily arrested and convicted under this section.

As said by the author of the last (4th) edition of Tremear's Criminal Code, p. 295, the offence in question is necessarily an individual offence and two or more should not be joined in such a charge.

In *Rex v. La Chance* (1915), 24 Can. Crim. Cas. 421, it was held that it was a misjoinder, which nullified the information and the summons thereon, to charge three persons jointly with a vagrancy offence as being a night-walker, and that even after plea the objection should be given effect to and the proceedings quashed.

In my opinion, with great respect for the learned magistrate, it was a substantial error to charge and try these two women jointly, and the conclusion at which I have arrived is that, if they had been tried separately, there was not evidence to establish all the three points above referred to, and that each of them was therefore wrongly convicted and each is entitled to have the conviction quashed and to be released from custody.

I say nothing, although something might be said, as to the right to arrest without warrant under the circumstances, nor as to the legality of the sentence imposed. Both these matters, taken alone, would not be sufficient probably to entitle the prisoners to be discharged.

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RE OTTAWA ELECTRIC RAILWAY CO. AND FEDERAL DISTRICT
COMMISSION.

August 5.

Easement—Exception—Reservation—Easement in Gross—Land Titles Act, R.S.O. 1927, ch. 158, sec. 93—Form of Transfer of Land.

The railway company, being the registered owner in fee simple of lot 26, plan M. 61, in the register of Land Titles at Ottawa, desired to transfer the lot to the Commission, but to retain the ownership of its rails, ties, poles, and wires, and its right to maintain and operate its railway over the lot:—

Held, that in the instrument of transfer the description of the lot to be transferred should be followed immediately by the exception of the existing rails, ties, poles, wires, works, and other fixtures which the parties intended should remain vested in the railway company. Then should follow the "reservation" of the easement over the lands transferred. The easement should comprise not only the right to continue to use and operate its tramcars and other vehicles over the existing and all future lines of rails upon the parcel transferred, but also the right at all times to erect and place upon the parcel other rails, etc., in substitution for those now there, and to enter into and upon the parcel for that purpose and for the purpose of making all necessary repairs and of removing the same and for purposes of inspection, etc., and should also provide that all additional or substituted rails, etc., should be and remain the property of the railway company.

An easement cannot strictly be made the subject either of exception or reservation in a deed of conveyance of land.

An appeal by the railway company and the Commission from a decision of the Local Master of Titles at Ottawa, under sec. 142 of the Land Titles Act, R.S.O. 1927, ch. 158.

June 21. The appeal was heard by ORDE, J.A., at a sittings of the Weekly Court at Ottawa.

Redmond Quain, for the appellants.

F. A. Magee, Local Master of Titles at Ottawa, in person.

August 5. ORDE, J.A.:—With the appeal is produced a statement signed by the Local Master of Titles, which, though not quite in the form mentioned in Rule 87 of the Land Titles Rules, I shall treat as sufficiently complying therewith.

The difficulty arises upon the request of the parties to register an easement in gross under sec. 93 of the Act. The railway company is the registered owner in fee simple of lot 26, plan M. 61, in the register of Land Titles at Ottawa. The lands consist of a narrow strip, and upon it are the rails, ties, poles, and wires of the railway company, the strip being a small part of the land over which the company carries and operates its line of railway.

The company now desires to transfer the lands to the Federal District Commission, but to retain its ownership of its rails, poles, etc., and its right to maintain and operate the railway over the land, and in order to carry this out a transfer in the following words has been tendered to the Local Master of Titles for registration and the issue of the proper certificates of ownership in consequence thereof:—

“Land Titles Act.”

“The Ottawa Electric Railway Company, of the City of Ottawa, in the county of Carleton, the registered owner of the lands registered in the office of Land Titles at Ottawa as parcel 1290 in the register for Carleton, in consideration of the sum of \$1 paid to it, transfers to the Federal District Commission, of the City of Ottawa, the land hereinafter particularly described, namely:—

“Lot No. 26 as shewn on plan M.61, filed in the said Land Titles office, being the whole of the said parcel.

“Reserving thereout and therefrom unto the said the Ottawa Electric Railway Company, and persons deriving title under it, the sole and exclusive permission, right, and privilege, at any time or times, of constructing, completing, operating, and maintaining, over, on, and upon the said land, or any part thereof, and either upon rails or otherwise, (a) a single or double track line of railway with the necessary side-tracks, switches, turn-outs, poles, wires, conduits, works, and appliances, and (b) its transportation system as defined in its special Acts, and any vehicle of such system, and excepting thereout and therefrom the ownership of and property in the track of railway, and all poles, wires, works, and appliances used or formerly used in connection therewith, now on the said land, the latter not to be removed therefrom without the written consent of the Ottawa Electric Railway Company; it being understood and agreed that the Federal District Commission shall have the right to construct, maintain, use and permit to be used, a crossing or crossings for passengers on foot, or with horses, carriages or other vehicles, at any point or points over the said land, or track of railway, if any; provided however that any crossing or crossings so constructed shall be constructed and maintained at the sole cost of the Federal District Commission, and without expense, damage or injury to the Ottawa Electric Railway Company, and that at such crossing or crossings the vehicles of the Ottawa Electric Railway Company shall have precedence over the servants or agents of and all persons authorised by the Federal District Commission crossing the said land, or track of railway, if any, and the Ottawa Electric Railway Company may, by notice in

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writing, require the Federal District Commission to compel its servants or agents and all persons authorised by it using the said crossing or crossings to come to a full stop before proceeding to cross the said land, or track of railway, if any.

"Dated at Ottawa the 11th day of June, 1930."

The Local Master has refused to register the transfer and to issue the two certificates upon the ground that, as drawn, the instrument purports to create an easement, not only upon the lands which become the property of the Commission, but also upon that portion of the realty, namely, the existing rails, ties and other fixtures, which are retained by the railway company as an exception from the lands comprising lot 26 as now registered. This would mean, in his view, that an easement is created over a part of the realty which still remains vested in the railway company; and, as he says, it is impossible to possess an easement over one's own land.

If the Court were called upon to determine what the parties intend by the instrument there would be no difficulty, but I think that the Local Master, who has a due regard for the niceties of conveyancing, is technically right, and that he ought not to be called upon to interpret the provisions of the transfer by sorting out and reconstructing in his own language the parcel actually intended to be granted to the Commission and the easement intended to be created thereon in favour of the railway company.

The Local Master has suggested that the stipulation as to the ownership of the rails, etc., should be incorporated in a separate instrument and kept off the register. This might serve the purpose, but I know of no reason why the parties, if they wish it, should not have all their respective rights and interests in the whole parcel of land spread upon the register for their mutual protection, provided they embody the transaction in an instrument in proper form.

The real difficulty here arises from the failure to define the exact parcel intended to be vested in the Commission first before proceeding to describe the easement which it is intended to give to the railway company. The exception from the grant appears in the middle of the reservation of the easement, and it is this that has rendered the task of the Local Master difficult.

In preparing an instrument of this nature, it is important to keep in mind what is meant by an exception from the grant and by the so-called reservation of an easement over the parcel granted. The words "excepting" and "reserving" are often misused in conveyancing; and, while a Court will usually give due effect to the intention of the parties notwithstanding the misuse of the words,

their use often indicates some confusion in the mind of the draftsman as to what he intends to effect by the instrument.

"An easement cannot strictly be made the subject either of exception or reservation in a deed of conveyance of land, for it is neither parcel of the land granted, which is necessary to enable it to be excepted, nor does it issue out of the land, as it should, to render it capable of being the subject of a reservation. It is, however, a very common thing to speak of an easement being reserved, or of the reservation of an easement. If an easement be incorrectly described in a deed as being reserved to a grantor of land, or excepted from the land conveyed, the reservation or exception operates as a grant of a newly-created easement by the grantee of the land to the grantor:" Goddard on Easements, 8th ed., p. 147. See also Armour on Titles, 4th ed., p. 257.

I think that the transfer should be redrafted in the following manner. Immediately after the description of lot 26, as it now appears in the transfer in question, should follow the exception of the existing rails, tie, poles, wires, works, and other fixtures which the parties intend shall remain vested in the railway company. This clearly defines the exact extent of the parcel of realty transferred to the Commission. Then should follow the "reservation" of the easement over the lands so transferred. The easement should comprise not only the right to continue to use and operate its tramcars and other vehicles over the existing and all future lines of rails upon the parcel transferred, but also the right at all times to erect and place upon the parcel other rails, etc., in substitution for those now there, and to enter into and upon the parcel for that purpose and for the purpose of making all necessary repairs and of removing the same and for purposes of inspection, etc., and should also provide that all additional or substituted rails, etc., shall be and remain the property of the railway company.

The nature of the appeal does not require any disposition of the costs thereof.

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RE BROOKS.

August 13.

Criminal Law—Extradition—Charge in Foreign State of Neglect to Provide for Infant Child—Order of Foreign Court for Maintenance of Child by Father—Agreement of Parents that Child should be Maintained by Mother—Financial Inability to Pay—Lawful Excuse—Evidence—Finding of Extradition Commissioner—Motion for Discharge of Accused—Habeas Corpus—Willingness of Father to Take Child to Live with him—Offence within Law of Foreign State—Authentication of Depositions—Criminal Code, secs. 242, 683(2)—Extradition Act, sec. 13—Technical Objections—Evidence of Offence according to Canadian Law.

An order was made by an Extradition Commissioner, upon the application of the State of Ohio, for the extradition of B. to that State to answer a charge, pending against him there, of wilfully neglecting and refusing to provide for his child, a girl under the age of 16 years. B. and the mother of the child were married in 1914 and divorced in 1922. The parents agreed that the child should remain with the mother and that no order for maintenance should be made against B., but the Ohio Court refused to grant the decree of divorce without also directing that B. should pay a fixed sum monthly for the maintenance of the child, and the custody of the child was awarded to the mother. The criminal proceedings pending in Ohio did not relate to this order for payment, but were based solely upon the allegation that B., charged by the law of Ohio with the duty of maintaining his infant child, had failed to do so. Upon the return of a writ of *habeas corpus* and *certiorari* in aid obtained by B. after his arrest under the order of the Commissioner:—*Held*, that the existence of the order for payment did not affect B.'s legal obligation to maintain his child.

Shaftesbury Union Guardians v. Brockway, [1913] 1 K.B. 159, followed. *Held*, also, that an offer made by B. in the course of these proceedings to take the child would not justify his discharge upon preliminary inquiry if his offence had been committed in this country.

Flannagan v. Overseers of Bishop Wearmouth (1857), 3 Jur. (N.S.) 1103, 8 E. & B. 451, distinguished.

Neither the evidence of lack of means, and therefore of lawful excuse for non-payment, nor the evidence as to willingness now to take the child, was sufficient to warrant the discharge of B.

The depositions of the witnesses before the Commissioner were not signed by the witnesses nor authenticated by affidavits, but were taken down in shorthand by the local court reporter and certified by her; and that was sufficient under sec. 683(2) of the Criminal Code.

The contention that, a civil court in Ohio having dealt with the maintenance of the child, a criminal charge of failure to support would not lie in this country, was not maintainable. The *Shaftesbury* case, *supra*, followed.

The Commissioner's finding as a fact that the circumstances of the case, if proved at the trial, would constitute an offence within the law of Ohio, was justified by the evidence.

Having regard to the provisions of sec. 242, subsecs. 3(b) and 4(c), of the Criminal Code, the facts proved were sufficient to place B. on his trial, assuming that he had been charged in this country with a breach of sec. 242.

The technicalities of the criminal practice should not be allowed to encumber or smother the administration of the procedure prescribed

in extradition matters: *Re Collins* (1905), 10 Can. Crim. Cas. 80, 83. The imputed crime was a crime within the Extradition Treaty, the Extradition Act, and the law of the State of Ohio, and there was before the Commissioner such evidence of criminality as, if the crime had been committed in Canada, would, according to Canadian law, have justified the committal of B. for trial.

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MOTION, upon the return of a writ of *habeas corpus* and *certiorari* in aid, for the discharge from custody of the accused, one Ernest B. Brooks, who had been, upon the application of the State of Ohio, ordered by his Honour Judge Macbeth of London, sitting as Extradition Commissioner, to be extradited to answer to a charge pending against him in that State of wilfully neglecting and refusing to provide for his child, one Helen Brooks, under the age of 16 years.

July 31. The motion was heard by GARROW, J., in Chambers. *W. B. Henderson* and *G. L. Mitchell*, for the accused.
G. M. Jarvis, for the informant.

No one appeared for the Attorney-General for Ontario, although notified.

August 13. GARROW, J.:—Brooks and the mother of the child were married in 1914, and divorced in 1922, by what were undoubtedly collusive divorce proceedings. They resided in Wyandot county, Ohio, and the child was born there. The parents apparently agreed that the child should remain with the mother and that no order for maintenance of the child should be made against Brooks. The latter was served with the divorce proceedings by publication and did not appear, and the decree was granted, but the Court refused to grant it without also directing that Brooks should pay \$16 a month by way of maintenance for the child, which was ordered, and the custody of the child was given to the mother.

Brooks married another woman, and is now and has been for some time living on a small market garden farm near London, Ontario. His former wife also remarried, but is divorced for the second time, and she and the child are now, I understand, living with her parents in Ohio.

Brooks never at any time seriously attempted to comply with the terms of the order as to the maintenance of the child. He sent a few of the stipulated payments, and later some sums of money as gifts, but what he has paid would not amount to more than \$100 in all since the date of the divorce, some 8 years ago.

I mention the facts relating to the divorce and the order for payment, since a good deal was made of them on the argument, and of the fact that the parents had practically agreed that nothing

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should be paid by the father. But, on consideration, I do not know that much turns upon these points. The proceedings now pending in the State of Ohio do not in any way depend upon or relate to the divorce or to the order for payment of the \$16 a month, but are based solely upon the allegation that the parent, charged by the law of Ohio with the duty of maintaining his infant child, has failed to do so. And in this connection the case referred to and relied upon by the learned Judge appears to me to be in point. That case is *Shaftesbury Union Guardians v. Brockway*, [1913] 1 K.B. 159, and Lord Alverstone, C.J., at p. 163, said, in reference to the existence of an order for payment under which default had been made:—

“The existence of the order under sec. 5 of the Act of 1895 does not seem to me to affect the respondent’s legal obligation to maintain his children, and the existence of that order disobeyed is no answer to the information and does not oust the jurisdiction of the justices to convict the respondent of the offence alleged against him.”

The ground chiefly relied upon in demanding the accused’s discharge is that his failure to provide for his daughter was owing to his financial inability, and that he has expressed himself as willing to have the child live with him, and that consequently he cannot possibly be convicted and should not be placed on trial for wilful neglect to furnish necessaries. And in support of this contention it was said, in effect, that the learned Judge had found as a fact that Brooks was unable to pay and is in fact insolvent. Upon a careful perusal of the findings, I cannot extract that meaning from what the learned Judge said. He did, it is true, refer to Brooks as being in insolvent circumstances, in the sense that his liabilities, recently incurred, exceed his assets, but he added, “Whether he can make up that deficiency by manual labour or earning wages is another matter altogether,” and he concludes by saying: “I think a *primâ facie* case has been made out that for the past 7 years the accused has done nothing for the support and maintenance of his infant daughter . . . and I see no excuse for the conduct of the accused.” That is not a finding of financial inability to pay, but rather of the opposite, and I am unable, upon a careful perusal of the depositions, to say that there was no evidence to support it.

As to the case, much relied upon by counsel for the accused, of *Flannagan v. Overseers of Bishop Wearmouth* (1857), 3 Jur. (N.S.) 1103, 8 E. & B. 451, in which a conviction recorded against a husband for failure to supply his wife with necessaries was set aside, he having, during the course of the proceedings, offered to

receive his wife back and treat her kindly, which offer she refused, I am of the opinion, even assuming the case to be wholly applicable to the present, that Brooks' offer to take the child, made during the course of these proceedings, would not justify his discharge upon preliminary inquiry if the offence complained of had been committed in this country.

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And further, as to his financial inability, if he can, as he says, give her a comfortable home, it is difficult to believe that he has been, during the past number of years, totally unable to comply with the order of the Ohio Court as to the monthly payment. The fact appears to be that he was perfectly willing that the child should remain with the mother. At any rate he made no determined effort to the contrary. The child visited him once two years ago, coming without invitation from him, and remained a month, and it is said he then asked her to remain with him permanently, which she refused to do, preferring to be with her mother.

Upon the whole, I do not think the evidence of lack of means and therefore of lawful excuse for non-payment, or the evidence as to willingness now to take the child, is sufficient to warrant the discharge of the accused.

A number of other objections were taken as follows:—

First, by way of preliminary objection, that the depositions were not signed and not authenticated by affidavit. The evidence, it appears, was taken in shorthand by the court reporter of Middlesex county and certified by her. See the Criminal Code, sec. 683(2).

Second, that the offence applicable under the Extradition Treaty (see p. xxi. Statutes of 1923, Canada) refers to wilful non-support of minor children (the plural). I do not think this requires serious consideration.

Third, that a civil court in Ohio has dealt with the maintenance of the child, and, that being so, a criminal charge for failure to support does not lie under our law. I think the case already referred to, *Shaftesbury Union Guardians v. Brockway*, [1913] 1 K.B. 159, answers this contention.

Fourth, a contention as to a defect in the original warrant was not pressed.

Fifth, that the proof of the law in the State of Ohio was not satisfactory and sufficient. Upon a perusal of the evidence on this point, I am of the opinion that the learned Judge's finding as a fact that the circumstances of the case, if proved at the trial, would constitute an offence within the law of Ohio, was quite justified.

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Sixth, that the prosecution must shew that an offence has been committed not only against Ohio law but also such an offence as, if committed in Canada, would also be a breach of Canadian law; that such law is found in sec. 242, subsec. 3(b), of the Criminal Code, and under that section the prosecution must establish the necessitous circumstances of the child and the lack of lawful excuse on the part of the father to furnish necessities; and, among others, the case of *Rex v. Yuman* (1910), 17 Can. Crim. Cas. 474, was referred to. In my view, and bearing in mind the provisions of sec. 242, subsec. 4(c), as to what shall be *primâ facie* evidence of neglect to supply necessities, the facts proved were sufficient to place the accused on his trial, assuming that he had been charged in this country with a breach of the section referred to.

Seventh, objection was taken that the accused was not addressed by the Commissioner in the language of sec. 684(2) of the Code, and reference is made to sec. 13 of the Extradition Act, R.S.C. 1927, ch. 37, by which it is provided that "the fugitive shall be brought before a judge, who shall . . . hear the case, in the same manner, *as nearly as may be*, as if the fugitive was brought before a justice of the peace, charged with an indictable offence committed in Canada." I question whether the provision of sec. 684(2) has any application to the present case. The words italicised above indicate that there are distinctions between an application for extradition and a preliminary inquiry before a justice. The accused was not prevented from giving evidence. He did in fact give evidence himself and called other witnesses. In addition, I would adopt the language of Duff, J., in *Re Collins* (1905), 10 Can. Crim. Cas. 80, 83, that "the technicalities of the criminal practice should not be allowed to encumber or smother the administration of the procedure prescribed."

Taking the objections as a whole and Mr. Henderson's very able and exhaustive argument, I am, notwithstanding them, after giving the matter full consideration, of the opinion that the four points mentioned in the case last referred to as being necessary to entitle the demanding country to the extradition of the accused have been established here, namely:—

(1) That the imputed crime is a crime within the Extradition Treaty; and (2) within the Extradition Act; and (3) within the law of the State of Ohio; and (4) that there was such evidence of criminality before the learned Judge as, if the crime had been committed in Canada, would, according to Canadian law, have justified the committal of the accused for trial.

The motion therefore is refused.

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ATTORNEY-GENERAL FOR ONTARIO V. NATIONAL TRUST CO. LTD.

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Succession Duty—Tax upon Property Transferred by Person before Death—Immediate Gift inter Vivos—Valuation of Property at Time of Gift — Succession Duty Act, R.S.O. 1927, ch. 26 — Increased Value—Indirect Taxation—Powers of Provincial Legislature—B.N.A. Act, sec. 92(2). August 20.

In December, 1925, W. gave to his wife 500 shares of the capital stock of a private company, and died in May, 1929. It being admitted that the gift took effect as an immediate gift *inter vivos*, within the meaning of clause (ii) of para. (b) of subsec. 2 of sec. 8 of the Succession Duty Act:—

Held, having regard to the provisions of secs. 4, 8, 12, and 13 of the Act, that the shares were to be valued for the purposes of the Act as of the date of the gift, and not that of the death.

Semble, that, in so far as the Act attempts to impose a tax upon the donee based upon the fiction that the increased value of the property given has accrued to the donee by reason of the death of the donor, the Act goes beyond the limits of the provincial powers of taxation—the tax in respect of the increased value being indirect.

MOTION by the plaintiff for judgment upon the facts admitted by the pleadings.

March 29. The motion was heard by ORDE, J.A., in the Weekly Court, Toronto.

J. T. White, K.C., for the plaintiff.

W. N. Tilley, K.C., for the defendants.

August 20. ORDE, J.A.:—The late William Edward Wilder, of Toronto, died on the 28th May, 1929, and the defendant company is the sole executor and trustee under his will. The defendant Mary Marjorie Wilder is his widow.

On the 30th December, 1925, the deceased gave to his then wife, the defendant Mary Marjorie Wilder, 500 shares of the capital stock of Picton Securities Ltd. It is admitted that the gift took effect as an immediate gift *inter vivos*, within the meaning of clause (ii) of para. (b) of subsec. 2 of sec. 8 of the Succession Duty Act, R.S.O. 1927, ch. 26, and the amendments thereto.

Picton Securities Ltd. is a private company, incorporated under the Ontario Companies Act, and has its head office in this Province. Its shares are not transferable to any person not already a shareholder without the previous consent of the directors. No shares of the company have ever been sold or offered for sale.

It is admitted that the value of the 500 shares at the date of the gift was \$50,240, and at the date of the death of Wilder was \$264,183.50.

The Attorney-General asks for a declaration that the value of the shares for succession duty purposes shall be taken as at the

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date of death, namely the 28th May, 1929, and not as at the date of the gift, the 30th December, 1925, and that the Province is entitled to recover succession duty in respect of the shares upon the value as so calculated.

The sections of the Act upon which the Attorney-General chiefly relies are sec. 4, sec. 8, and particularly para. (b) (ii) of subsec. 2 thereof, para. (a) of subsec. 1 of sec. 12, and subsec. 5 of sec. 13.

Section 4 provides that "in determining the dutiable value of property or the value of a beneficial interest in property the fair market value shall be taken as at the date of the death of the deceased, and allowance shall be made for reasonable funeral expenses, debts and encumbrances and Surrogate Court fees."

By para. (b) of sec. 1, "dutiable value" is defined in much the same language, with the additional inclusion in the deductions of "other allowances and exemptions authorised by this Act."

Section 8 provides generally that "all property situate in Ontario and any income therefrom passing on the death of any person . . . shall be subject to duty"

Subsection 2 of sec. 8 is designed to impose duty upon property which but for some such statutory provision could not be subject to duty as part of the deceased's estate. It affects property transferred by the deceased in contemplation of death, *donationes mortis causâ*, gifts *inter vivos*, gifts of property over which the donor retained the possession and enjoyment, etc., etc. That part of the subsection applicable to the issue here reads as follows:—

"(2) Property passing on the death of the deceased shall be deemed to include for all purposes of this Act the following property:—

"(b) (ii) Any property taken under a disposition operating or purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust or otherwise, made since the 1st day of July, 1892."

Section 12(1) makes every heir, legatee, donee, or other successor, and every person to whom property passes for any beneficial interest, liable for the duty upon so much of the property as so passes to him, and requires him within 6 months of the death of the deceased to file a statement shewing "(a) a full inventory in detail of all the property of the deceased person and the fair market value thereof on the date of his death."

Section 13 sets forth the procedure which the Provincial Treasurer may adopt when dissatisfied with the inventory and the values therein, and provides means for a valuation by the Sheriff. Subsection (5) requires the Sheriff, in that event, to "appraise the

property mentioned in the inventory, or any part thereof, as directed by the Surrogate Judge, or any property wrongfully omitted, at its fair market value at the date of the death."

The contention of the Attorney-General is that under those provisions the property so given during the deceased's lifetime is to be treated as if it had remained the property of the donor, and had not passed to the donee until the donor's death; and that it must be valued accordingly.

Now, we are dealing here with a statutory tax in respect of a gift *inter vivos* which is not imposed by direct or express language but under the guise of a legislative fiction, and it is important, in determining how far this fiction is to be carried, to keep in mind the realities of the situation. The property did not in fact or in law pass upon the death of the deceased. It passed when the gift was made; the donee's title to it was then complete; and no legislation short of a statutory divesting of such title can alter that fact.

The difficulty here arises from the language of sec. 4 and subsection. 2 of sec. 8. Subsection 2 of sec. 8 says that "Property passing on the death . . . shall be deemed to include for all purposes of this Act" gifts *inter vivos*. Does this mean that for the purpose of taxation the property so given must be treated as if not given until the death of the donor and then to be taxed upon that footing? That is in substance the Crown's contention. But that is not the language of the section, nor is it, in my opinion, its effect.

The provision is designed to impose a succession duty upon the donee of property given during the lifetime of the donor, subject of course to the limitations as to amount and otherwise fixed by subsec. 3 of the same section. Having, by subsec. 1, declared that all property passing on the death of any person shall be subject to duty, the Act merely provides that property given during the lifetime of the deceased shall be included in that category. The effect of that is, in my judgment, to make the gift with all its attributes as to value and the person to be taxed and the death of the donor coincident.

If this is not the true meaning and intention of the Act, and it is to be construed as urged by the Crown, many anomalies result. The Act rakes into the category of taxable property all gifts as far back as the 1st July, 1892. If, for example, a man gave his daughter a home worth \$25,000, as a wedding present, 35 years ago, and she had occupied it up to the date of her father's death in 1930, and in the meantime, without the expenditure of any money in improvements, the property had increased in value to \$100,000, is the donee to be taxed upon that value? That is the Crown's

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contention, but the Act will have to say so explicitly before I can bring myself to believe that that is its meaning.

I asked Mr. White what would be the effect upon the donee's liability if, in the case I have just put, she had sold the house for \$25,000, or if in the present case Mrs. Wilder had sold the shares for \$50,240, and his answer was that the Succession Duty office in such cases valued the gift at the amount realised and not at the present value of the property. But there is nothing in the Act to justify any such practice, though it would be palpably unjust if the practice were otherwise. But, if the construction urged by the Crown is correct, the mere fact that the donee had disposed of the property can be of no consequence, and the donee would be liable to duty upon the value at the death of the donor, whether or not the property was then still in her possession. If that is the true meaning of the Act, then the practice of the Department cannot affect it, but the recognition of the palpable injustice in the one case is not without its significance.

Mr. White referred to a passage in the 6th edition of Hanson's Death Duties, where sec. 2 of the Imperial Finance Act of 1894 is discussed. The provisions of the English Act are not the same as ours, and *bonâ fide* gifts made more than 12 months (now 3 years) before death are not subject to taxation. At p. 100 it is stated: "Where the gift is of a sum of money, the value to be brought into account is the actual sum given. Where it is not money, the value of the property given is taken as at the death of the deceased;" and there is a reference to sec. 7, which deals with valuation. Mr. White says that the practice thus stated in Hanson has been adopted by the Department. Just why this reference to the English practice in this respect should be adopted does not appear. There is no similarity in the language of the two Acts to warrant it. And it is noteworthy that in the 7th edition of Hanson, published in 1925, 14 years after the 6th edition, the paragraph cited by Mr. White has been omitted, and is replaced by the following, at p. 80: "The value to be brought into account is the value of the gift when made. The duty is paid by the donee."

It may seem that the view I have taken of the real effect of sec. 8 as to the inclusion of gifts *inter vivos* among the items constituting "property passing on the death" is in the teeth of the express provision of sec. 4 that the dutiable value "shall be taken as at the date of the death of the deceased," but I think, when the provisions of the Act as to valuation are carefully examined, it will be plain that this was intended to apply to the valuation of property passing to the beneficiary in either of two categories.

The gift might be in the form of an annuity or of a life-estate, or of a remainder dependent upon a life-estate, or of some like interest in the estate the enjoyment or possession of which was either deferred or was in its nature partial. Or it might be an interest conferred in the lifetime of the deceased, but of such a character as to postpone any real possession or enjoyment until the death of the settlor or donor, such as are set forth in subsec. 2 of sec. 8. Apart from gifts which are really gifts *inter vivos*, the possession or enjoyment of the benefits of gifts within that latter category arises only upon the death of the donor, and so may justly and fairly be regarded as coming into effect as the result of his death, and as forming part of the "succession" to his estate.

But a real gift made in good faith during the donor's lifetime is of a different character. There is nothing about it to connect it with the death of the donor, and the inclusion of property so given among the classes of property or interests in property to be taxed by an Act whose sole purpose is to impose taxes upon the succession to property by reason of the death of the owner has always seemed to me to be a legislative anomaly.

I cannot bring myself to believe or to hold that sec. 4 was ever intended to apply to the valuation of gifts *inter vivos*, made perhaps as long ago as the year 1892, in such a way as to perpetrate what, in many cases, would palpably be a monstrous injustice upon the donee.

It may be noted in passing that under the English system of taxation of property passing upon death the taxes are divided into three classes, namely, estate duties, legacy duties, and succession duties, which are dealt with by different Acts of Parliament and upon different principles. Gifts *inter vivos* are not taxed by way of succession duty at all. A gift *inter vivos* cannot really be deemed to pass upon the death of the donor. Any such theory is incompatible with the truth. An Act of Parliament may perhaps make it so for certain purposes, just as it may declare black to be white, but no Act of Parliament can really make black white, or a gift which really and legally takes full effect during the lifetime of the donor anything else but what it really is. Under the English Finance Act (1894) as amended, gifts *inter vivos* within 3 years of the death of the donor are treated as being evasions of the estate duty and so taxable: Hanson, 7th ed., p. 3. They are not taxed as if they had passed to the donee by way of succession to the donor's estate upon his death.

There is an aspect of this question which was not referred to in the argument, but which I think may be mentioned. There may be good ground for the view that, in so far as the Act attempts

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to impose a tax upon the donee based upon the fiction, for it is a fiction, that the increased value of the property given has accrued to him by reason of the death of the donor, the Act goes beyond the limits of the provincial powers of taxation. Though the tax undoubtedly falls directly upon the donee, there is an element of indirectness in the ascertainment of the amount of it, if the Crown's contention is sound, which might well make it beyond the powers of the Legislature. The amount is unascertainable until the death of the donor, and falls to be determined by the value of the property on the very day of his death. The donee may have long since disposed of the property for a sum less than its value at the donor's death, and yet he is taxable if the Crown's contention is correct (whatever the departmental practice in such case may be), upon an increase in value which he never enjoyed. The donee may have long since died, and his estate, including the subject-matter of the gift, been distributed. Must his legal personal representatives delay the winding-up of his estate until the death of the donor because of the uncertainty as to the amount of the estate's future obligation to the Crown for succession duties? In any of such cases it might well be held that the tax in respect of the increased value would be indirect.

Since the judgment of the Judicial Committee in *City of Halifax v. Fairbanks Estate*, [1927] A.C. 117, it is clear that the distinction between direct and indirect taxation for the purposes of determining the provincial power under para. 2 of sec. 92 of the British North America Act is not in all cases to be based solely upon John Stuart Mill's definition which was applied in *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575. I prefer not to elaborate this point, as it was not raised, but if the case goes higher, it might well be thoroughly canvassed.

In my opinion, the property in question is to be valued for the purposes of the Succession Duty Act as of the date of the gift, that is, at \$50,240, and there will be judgment accordingly. As the defendants have always been ready and willing to pay duties upon that value, the costs of the defendants should be paid by the Crown.

[GARROW, J.]

REGENT TAILORS LTD. v. McARTHUR.

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Sept. 2.

Landlord and Tenant—Right of Tenant to Damages for Delay in Getting Possession under Lease — Measure of Damages — Former Tenants Refusing to Give up Possession—Claim to Retain Possession Denied in Former Action — Third Parties — Indemnity — Whether Res Judicata.

By an indenture under seal dated the 14th March, 1928, the defendants leased to the plaintiffs store premises in a city for a term of 5 years commencing on the 1st September, 1928. The T. company refused to vacate the premises, contending that they were in possession under an oral lease, and an action was brought by the T. company, which failed and was dismissed; but it was not until the 7th September, 1929, that the present plaintiffs obtained possession under their lease; and this action was brought to recover damages suffered by reason of the delay. The defendants brought in the T. company as third parties:—

Held, that the plaintiffs were entitled to succeed in the action and to recover more than nominal damages.

The proper measure of damages was that stated in *Hadley v. Baxendale* (1854), 9 Ex. 341; and, to the extent to which the rule there stated applied here, the plaintiffs were entitled to damages (to be assessed by a Local Master).

Marrin v. Graver (1885), 8 O.R. 39, *Goodison v. Crow* (1920), 48 O.L.R. 552, and *Christin v. Dey* (1922), 52 O.L.R. 308, applied.

Held, also, that the T. company were liable over to the defendants in respect of such damages as might be assessed against the latter—the question of the liability of the T. company for the damages now claimed was not adjudicated upon in the earlier action.

ACTION to recover damages for the delay of the defendants in giving the plaintiffs possession of premises in the city of Windsor leased to them.

The action was tried before GARROW, J., without a jury at Sandwich.

D. L. McCarthy, K.C., and *L. Kert*, for the plaintiffs.

J. H. Rodd, K.C., for the defendants McArthur, Taylor, Simmers, and Bulmer.

D. A. Croll, for the defendant Moss.

I. F. Hellmuth, K.C., and *C. J. Adams*, for the third party Tip Top Tailors Ltd.

I. B. Levin and *N. A. Todd*, for the third party MacCrone & Co.

G. W. Poole, for the third party Massie.

September 2. GARROW, J.:—The defendants Evelyn May Simmers and Albert Bulmer are the executrix and executor of the will of Alexander Simmers, deceased, who, with the defendants Mc-

Garrow, J. Arthur and Taylor, all three acting on behalf of the Labelle Syndicate, executed a lease under seal to the plaintiffs of store premises in the city of Windsor known as number 303 Ouellette-avenue. The lease is dated the 14th March, 1928, and is for a term of 5 years, commencing from the 1st September, 1928, unless the lessors should have some trouble in getting possession from their former tenant, the third party, Tip Top Tailors Ltd., in which event the term was to commence on the 1st October, 1928.

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Tip Top Tailors refused to vacate the premises, contending that they were in possession under a verbal lease, and litigation ensued between them and the owners of the property. The action was tried before Mr. Justice McEvoy, who held against the contention of Tip Top Tailors, but it was not until the 7th September, 1929, that the present plaintiffs obtained possession under their lease, and this action is brought to recover the damages which the plaintiffs say they suffered by reason of the delay.

The defendant Moss took no part in the making of the lease, but he is joined as a defendant on the ground that he purchased the property from the Labelle Syndicate subsequent to the date of the lease, namely on the 15th day of March, 1929, and he is now the owner of the premises.

The defendants other than Moss brought into the action two sets of third parties: first, Tip Top Tailors Ltd., on the ground that if the defendants other than Moss are held to be liable to the plaintiffs, they are entitled to be indemnified by Tip Top Tailors, whose act or default it was that made it impossible for possession to be given to the plaintiffs; and, second, all the other members of the syndicate, on the ground that McArthur, Taylor, and Simmers were acting, in making the lease, for and on behalf of the Syndicate as a whole, and are entitled to contribution from them in respect of any liability to the plaintiffs.

The plaintiffs had been in possession as tenants of number 309 Ouelette-avenue under a lease which would expire on the 15th August, 1929. They were desirous of obtaining additional premises to carry on a purely "ready to wear" clothing business, and it was for this purpose that they negotiated for and secured number 303. Failing to secure possession of these premises, the plaintiffs looked about for others, and finally, in June, 1929, secured a lease of number 375 Ouelette-avenue for 5 years at \$450 a month. The plaintiffs say that this location is not nearly so desirable as 303. They also say that, before they could open their business there, it was necessary to make substantial alterations at an expense to them of \$2,860, which item forms part of the damages claimed.

The making of the lease by the defendants is not denied, nor is it denied that it was because of the position taken by Tip Top Tailors that the plaintiffs were prevented from getting possession. The real question as between the plaintiffs and defendants is—have the plaintiffs suffered any damages, and, if so, what is the measure of those damages? Counsel for the defendants, as well as counsel for Tip Top Tailors, contend that the plaintiffs have suffered none; that the damages suggested by way of loss of anticipated profits, loss on some 800 garments made specially to be sold in 303 and which it was said had to be sacrificed in order to make room in the factory, the cost of repairs to number 375 to make it suitable for occupation, are all too remote and should not be allowed.

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I intimated at an early stage that if I should hold the defendants liable I would direct a reference to determine the extent of that liability, and, having that statement in mind, counsel for the plaintiffs probably limited the evidence called by him beyond what he otherwise would have done.

In my view, sufficient has been established to shew that the plaintiffs are entitled to more than merely nominal damages. Counsel for the third party Tip Top Tailors, in resisting, as he was entitled to do, the claim made against the defendants, relied among other cases upon *Marrin v. Graver* (1885), 8 O.R. 39, an action by a tenant against his landlord for refusing to give him possession of the demised premises, in which it was held that the proper measure of damages in such a case is the difference between what the tenant agreed to pay for the premises and what they were really worth, and that it was not open to the tenant to shew that he rented the premises for the purpose of there carrying on a certain business, of which the landlord was aware, that he could not procure other premises, and to claim the profits which he might have made in such business if he had been let into possession.

But that case was expressly referred to in a much later case decided by the First Divisional Court of the Appellate Division in 1920, *Goodison v. Crow* (1920), 48 O.L.R. 552. That was an action brought for breach of a covenant for quiet possession contained in a conveyance from the defendant to the plaintiff. Meredith, C.J.O., said (p. 559): "It was known to the appellant (defendant) that the purpose of the respondent (plaintiff) in buying the farm was to grow sugar beets upon it—as to this there can be no question—and the parties to the contract must have contemplated that the result of the respondent not getting possession would be loss of the profit he would make from growing the beets on the farm, and the appellant is therefore liable for the loss which the respondent sustained by not being able to obtain posses-

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sion." He adds: "Nothing that was decided in *Marrin v. Graver* is opposed to this view. In that case the special circumstances relied on were not communicated to or known by the defendant." As to this latter statement, the head-note in *Marrin v. Graver* rather indicates that evidence that the defendant did know of the use to which the premises were to be put was rejected by Armour, J.; but, on a careful reading of the report itself, this does not appear to be so.

In the *Goodison* case, no damages were allowed for loss of profits in connection with the growing of sugar beets, not because the plaintiff would not have been entitled to such damages, if they could have been proved, but because it was established that the season in question was one in which it was impossible to raise a crop of beets successfully. I am quite satisfied from a perusal of the judgment that, if it had been otherwise, the plaintiff would have been allowed damages for the loss of such profits as he could have established.

The Court held, both in the *Marrin* case and the *Goodison* case, that the proper measure of damages in such a case as the present is that laid down in *Hadley v. Barendale* (1854), 9 Ex. 341, namely, that the damages allowed should be "such as may fairly and reasonably be considered either as arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of a breach of it."

The still more recent case of *Christin v. Dey* (1922), 52 O.L.R. 308, follows the line of reasoning adopted in *Goodison v. Crow*.

I do not know that it is necessary to discuss the distinction made by Mr. McCarthy between a breach of a covenant for quiet possession contained in a lease and a breach of an agreement to give a lease. It was pointed out by Chief Justice Meredith in the *Goodison* case that in the cases of *Rotman v. Pennett* (1920), 47 O.L.R. 433, and *Grindell v. Bass*, [1920] 2 Ch. 487 (both referred to in the present argument), the contracts in question were executory, whereas in the *Marrin* case and the *Goodison* case the contracts were executed. It seems to be sufficient to say that I am not able to make a distinction in principle between the present case and the *Goodison* case or the *Christin* case, and I would hold, therefore, that to the extent to which the rule as stated in *Hadley v. Barendale* applies, to that extent the plaintiff company is entitled to damages, and I would refer it to the Local Master at Sandwich to assess those damages on the basis mentioned. I think it better not to tie his hands by expressing any opinion of my own as to

so much of the evidence upon the question of damages as was adduced before me.

Judgment will be entered for the amount of the damages so found against the defendants other than the defendant Moss. As to him it may perhaps have been advisable to make him a party, but he took no part either in the making or the breach of the covenant for quiet possession and had no interest in the property whatever until the 15th March, 1929. That was after judgment had been delivered by McEvoy, J., in the action brought by Tip Top Tailors, and while an appeal by the plaintiffs from that judgment was pending. Throughout, so far as the evidence before me indicates, Moss was in no way responsible for the loss which the plaintiffs suffered, and as to him the action should be dismissed with costs.

As to the third party Tip Top Tailors, I was at first inclined to think, although it was not so contended, that the matter was *res adjudicata*, inasmuch as the defendants McArthur, Taylor, and Simmers, in the action brought by Tip Top Tailors, counter-claimed against them for, among other things, "damages which may be assessed against the defendants by reason of their inability to give possession to the Regent Tailors Limited on the 1st day of September, 1928." That it was clearly in the minds of the defendants to claim these damages early in the dispute is indicated by Mr. Harvie's letter to the solicitor for the present plaintiffs of the 12th September, 1928, in which he said, referring to the litigation then pending with Tip Top Tailors: "We appreciate the fact that you will be entitled to damages and we hope, if the action goes on, to be able to prove your damages in our counterclaim." Whether any attempt was made to prove those damages does not appear. The counterclaim was dismissed in a word or two by Mr. Justice McEvoy, who treated it, as it probably was presented, merely as a claim for double rent for wilfully overholding and the formal judgment as entered dealt with the counterclaim in this manner: "4. And this Court doth further order and adjudge that the defendants' counterclaim against the plaintiffs for double value for wilfully overholding be and the same is hereby dismissed without costs."

It would appear, therefore, that the question of the liability of Tip Top Tailors for the damages now claimed was not adjudicated upon in the earlier action, and, as the point was not taken by counsel for that company although mentioned by myself, nor set up as a defence in its pleading, I feel the less hesitation in concluding that the question is still open for decision.

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If that is so, I can see no reason whatever for not holding Tip Top Tailors liable over to the defendants in respect of such damages as may be assessed against the latter by the Master, and I would direct judgment to be entered against them on the third party issue to that effect, with the costs of such issue, and including the defendants' costs of the action.

As to the other third parties, it was not proved before me that they were members of the Labelle Syndicate, and I dismiss the third party claim as against them with costs, but without prejudice to the defendants attempting to shew, in any subsequent proceedings they may elect to take, that these parties or some of them should be held liable to contribution.

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Sept. 3.

Company—Incorporated Brewing Company — Subsidiary Company Incorporated to Act as Sales-agent—Moneys Expended in Promoting Sales — Class-action by Shareholder to Recover — Status of Plaintiff—Receipt of Part of Moneys—Shares Allotted without Payment therefor—Matters of Internal Regulation.

The defendant brewing company was incorporated under the Dominion Companies Act in 1924. In 1926 the St. C. company was organised, also with a Dominion charter and with substantially the same incorporators and officers, to act as the agent of the brewing company to promote the sale of its products. By an agreement in writing between the two companies, the prices which the St. C. company was to collect from customers upon sales, as well as the rates at which they were to remit when so collected, were fixed, the difference in favour of the St. C. company constituting their remuneration for the services to be rendered. The plaintiff, a shareholder and a director of both companies, brought this action (on behalf of himself and all other shareholders of the two companies) against the two companies and four individual defendants, who were shareholders, directors, and officers of both companies, to compel the individual defendants to pay back into the treasury of either or both companies sums alleged to have been improperly paid to them by the companies in 1927, 1928, and 1929. These sums were paid to the individual defendants for "promotion expenses," and the plaintiff complained, not that payments for that purpose were improper, but that the sums paid were excessive:—

Held, that, in so far as the action rested upon the contention that the moneys paid by the brewing company to the St. C. company were improperly paid, it failed for the reason that the plaintiff himself received and still retained a portion of those moneys, and was not therefore in a position to complain either individually or as a shareholder of the brewing company.

Towers v. African Tug Co., [1904] 1 Ch. 558, and *Henderson v. Strang* (1920), 60 Cas. S.C.R. 201, followed.

Held, also, that, as the plaintiff paid nothing for his shares in the St. C. company, and had received from it considerable sums by way of profit he was not, nor was any other so-called shareholder, for the same reason, in a position to maintain this action.

Admitting the *bonâ fide* corporate existence of the St. C. company and the necessity of expending money in promoting sales, the fact that the sums spent were large and were expended by the individual defendants without any proper accounts being rendered or kept, was a matter of internal regulation of the company's affairs, with which the Court has no right or power to interfere.

Burland v. Earle, [1902] A.C. 83; followed.

THE plaintiff, suing on his own behalf and on that of all other shareholders of the Riverside Brewing Company Ltd. and of the St. Clair Company Ltd., brought this action against Kirsch, Thiery, Handson, and Pascuzzi, shareholders and directors of both companies, as well as president, vice-president, secretary, and treasurer respectively of each, and against the two companies as well, to compel the individual defendants to pay back into the treasury of either or both companies the sum of \$103,500, alleged to have been improperly paid to them by the said companies in the years 1927, 1928, and 1929, or such other amount or amounts as shall be found to have been improperly paid to the said defendants, and to compel the defendant companies to pay to the plaintiff the sum or sums to which he may be found entitled.

The action was tried before GARROW, J., without a jury, at Sandwich.

J. H. Rodd, K.C., and *R. S. Rodd*, for the plaintiff.

Gordon Fraser, for the defendants.

September 3. GARROW, J.:—The brewing company was incorporated under the Dominion Companies Act in 1924, but did not begin the manufacture of beer until November, 1926. About the same time, that is in 1926, the St. Clair Company was organised, also with a Dominion charter and with substantially the same incorporators and officers, as the agent of the brewing company to promote the sale of its products.

By an agreement in writing between the two companies over their respective corporate seals, the prices which the St. Clair Company was to collect from customers upon the sale of the product of the brewing company, as well as the rates at which they were to remit when so collected, were fixed, the difference in favour of the St. Clair Company constituting their remuneration for the services to be so rendered.

Some evidence was directed to the question whether the agreement was ever properly authorised or entered into by the brewing

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company. I do not find it necessary to go into that (although I may say that I believe it was), because the plaintiff does not in his pleading attack the agreement, nor does the document itself authorise the payment of any sums by the brewing company to the St. Clair Company for "sales promotion," which appears to be the real matter of which the plaintiff complains.

The evidence indicates that in introducing to the consuming public a new brand of beer, as any other manufactured product, one must expect to spend a considerable sum of money by way of a publicity campaign, and the burden of the plaintiff's complaint is not that commissions on sales were paid to the St. Clair Company or that large salaries were paid to the officers of the St. Clair Company who were also officers of the brewing company, all of which came really from the brewing company, and not even that reasonable "sales promotion" expenses were paid to the individual defendants, but that what was paid in this way was greatly in excess of what should have been paid, and that profits that should have been distributed to shareholders were eaten up in expenses. In the year 1927 the individual defendants received from the St. Clair Company \$51,578.18, of which \$16,500 was for salaries, \$1,200 was for directors' fees, and the balance, \$33,878.18, was for "sales promotion." In the year 1928 these same parties received a total of \$48,864.90, of which the same amount as in the preceding year was salaries, nothing was paid for directors' fees, and \$32,364.90 was for "sales promotion." During these same years the gross sales of the brewing company were for the year 1927, \$452,439.99, and for the 15 months ending in March, 1929, \$727,773.86. The foregoing figures as to the amounts paid to the individual defendants are taken from exhibit 18; but from a perusal of two other exhibits, 9 and 10, it appears that in 1927 "sales promotion" amounted to \$36,829 and in 1928 to \$43,144. The difference may lie in the fact that others besides the four mentioned shared in the profitable enterprise of promoting the sale of the beer of the Riverside Brewing Company.

The stock of the St. Clair Company issued as paid-up amounted originally to \$36,600. The plaintiff was a director and received stock to the par value of \$7,000. None of the \$36,600 of issued stock was paid for, according to the evidence of the witness Petzer, not even in part. The plaintiff, as well, no doubt, as other shareholders of the St. Clair Company, of whom there were only seven, received from time to time by way of dividends considerable sums of money, the plaintiff getting in the year 1927 sums totaling \$3,100, which money he still retains; and, in so far as the action rests upon the contention that the moneys paid by the brew-

ing company to the St. Clair Company were improperly paid, it must fail for the reason that the plaintiff himself received and still retains a portion of those moneys, and is not therefore in a position to complain either individually or as a shareholder of the brewing company. See *Henderson v. Strang* (1920), 60 Can. S.C.R. 201, and particularly the judgment of Anglin, J., at p. 210, and *Towers v. African Tug Co.*, [1904] 1 Ch. 558, at p. 572.

That the plaintiff knew quite well what was going on I have little doubt. He was one of the original directors of the Riverside Brewing Company. He was also a director of the St. Clair Company. He admits himself that he learned in September or October, 1927, that the individual defendants had received some \$35,000 for "sales promotion," and he says that he then objected and that they promised that no further moneys would be expended by them in this manner. This is denied by Kirsch, who says, as does Thiery also, that the plaintiff knew about the payments and made no complaint whatever, and that he attended meetings of the directors of the St. Clair Company, as the minutes indicate he did, although he himself says he was present at only one. Thiery says he at one time suggested to the plaintiff that he make himself active in pushing the sale of the beer, but he declined, saying that he would not leave Detroit, where he lives, and come over to Riverside, the headquarters of the companies, for \$25,000 a year.

These large sums of money paid to the individual defendants were, it is said, all expended in the interest of the company, in entertaining, hiring trucks, and pushing sales generally. No record was kept by any of them, apparently, no expense-accounts turned in, and no attempt made by any one on behalf of the company to see that the money claimed to have been spent actually was expended in the interest of the company. The cheques for these payments were drawn by Handson, the secretary, and one of those who participated, who would tell the accountant how to enter the amount in the books. No other record was kept.

I have no doubt that expenditure of considerable sums of money was necessary to enable the brewing company's product to be marketed, and that the large sales that they enjoyed were due to a considerable extent to the efforts of the individual defendants, but I can see no reason whatever for there having been no proper records kept of their expenditures, and, in the absence of these, I think it may well be questioned whether the individual defendants were quite as honest as they profess they were in the use made of the large funds placed in their hands. But, whatever ground of complaint the company itself may have, that is the St. Clair Company, I am of the opinion that the plaintiff cannot

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Garrow, J. complain either individually or on behalf of the other shareholders.
1930. With one or two exceptions, I was not impressed with the good
SHIESEL faith or reliability of any of the witnesses. They were all en-
v. gaged in a business which all seemed to admit could only be made
KIRSCH. to prosper by more or less questionable means, and my belief is
that the plaintiff knew, or could have known if he had wanted to,
everything of which he now complains, that he was perfectly will-
ing to profit by the efforts of the individual defendants at the
expense of the brewing company, and that the present action is
an attempt on his part to compel the individual defendants to
pay to him, without his doing any of the work, some of the money
which they received, and which, he says himself, was not wrongly
paid in principle but only excessive in amount.

I am also of the opinion that one who has paid nothing what-
ever for his stock, although he has received on it by way of profits
\$3,100, is not in a position to maintain this action, nor could any
of the other shareholders so-called, who are all in the same posi-
tion. The evidence of the bookkeeper Petzer, to whom I give full
credence, that none of the St. Clair stock was paid for, was not
contradicted. If that is so, instead of receiving further profits,
all the shareholders should pay back into the treasury the profits
they have received, at least to the extent of the subscribed capital.
The company itself may have a very good cause of action against
all its shareholders and against the four individual defendants to
account for the moneys they received, but that it does not lie in
the mouth of the present plaintiff or those whom he claims to
represent to complain, I have no doubt.

I do not think it necessary to consider whether in any event
an action of this kind would lie at the instance of even a qualified
shareholder, suing on behalf of the other shareholders as well as
himself, or whether it could be brought only by the company itself.
It may well be that the St. Clair Company was organised and
existed only for the purpose of diverting profits really earned by
the brewing company into the pockets of those who controlled the
St. Clair Company, but that position is not and could not well be
taken by the plaintiff, so that, admitting for the purposes of this
action the *bonâ fide* corporate existence of the St. Clair Company
and the necessity, which seems to have been conceded, of expend-
ing considerable sums in pushing sales, the mere fact that these
sums were very large and that they were expended by the four
individual defendants without any proper accounts thereof being
kept or rendered would, after all, seem to be a matter purely of the
internal regulation of the company's affairs, with which, speaking

generally, the Court has no right or power to interfere: *Burland v. Earle*, [1902] A.C. 83.

I have read all the authorities referred to by counsel for the plaintiff. If this were an action brought by the St. Clair Company, itself, or if the plaintiff were himself qualified to maintain it, as I hold he is not, I should have referred more at length to those authorities. As it is, I do not, I think, require to do so.

In my opinion, the action fails on all grounds and should be dismissed. Had the companies defended separately, I should have given them their costs of the action. They did not do so, however. The individual defendants are not in my view entitled to costs, and I therefore make no order as to the costs of any of the defendants.

[ORDE, J.A.]

TRUSTEE OF THE PROPERTY OF C. E. PLAIN LTD. v. KENLEY
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Sept. 15.

Company—Secret Transactions—Shareholders and Directors—Mortgage—Invalidity—Impairment of Capital—Fraud upon Company and Creditors—Recovery of Moneys Paid—Action by Trustee in Bankruptcy of Company.

In an action brought by the authorised trustee in bankruptcy of the property of an incorporated joint stock company against K., the daughter of P., deceased, the owner in his lifetime of nearly all the shares in the company, and against a trust company, the executor of P., to set aside a mortgage made by the company to K. upon certain lands of the company, and by K. assigned to the trust company as executor of P., it was alleged that the mortgage was *ultra vires* of the company or was fraudulent and void as against the plaintiff; and the plaintiff also sought to recover certain sums paid by the company to the defendant executor in respect of the mortgage and interest thereon. There were certain agreements and secret transactions, in respect of the shares and property of the company, between K. and B., the manager of the company, in which the executor of P. and the company, acting by its directors and officers, including K. and B. themselves, took part. The company was in effect a "one-man company" or a "family company." The whole purpose of the transaction attacked was to enable K. or her father's estate to sell and B. to buy the business for \$60,000:—

Held, that no evidence was adduced sufficient to establish a deliberate intent to defraud such as would bring it within the Fraudulent Conveyances Act, R.S.O. 1927, ch. 134.

But a transaction in which a limited joint stock company is involved may be constructively fraudulent as against future creditors because it violates some fundamental principle of law governing the constitution and management of the company. The company must keep unimpaired the capital upon which creditors are to depend for payment, and (speaking broadly) it cannot lawfully give away its property either to shareholders or others. The attack upon the

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transaction was based upon the fact that the assets dealt with belonged to a company; and a limited liability company cannot be permitted to deal with its property in the way this company did. The transaction attacked did not amount to a distribution of profits or surplus by way of dividend.

Re Dorenwends Ltd. (1924), 55 O.L.R. 413, distinguished.

The transaction, however honest its intention may have been, constituted in effect a fraud upon the company and the company's creditors and ought to be set aside; and the plaintiff should recover from the executor of P. the sums paid by the company to the trust company as executor, and recover from P.'s widow, to whom certain sums representing interest were paid by P.'s executor out of the moneys paid to that executor, if the total amount paid by the company cannot be recovered from P.'s estate in the hands of his executor.

AN action by the authorised trustee in bankruptcy of the property of C. E. Plain Ltd. against Lilian P. Kenley and the Royal Trust Company to set aside a mortgage made by C. E. Plain Ltd. to the defendant Kenley, as *ultra vires* of the mortgagor company or as fraudulent and void as against the plaintiff, and also to recover \$5,392.24 paid by C. E. Plain Ltd. to the defendant the Royal Trust Company, executor of the will of C. E. Plain, deceased.

May 15. The action was tried before ORDE, J.A., without a jury, at Ottawa.

T. A. Beament, K.C., and *A. W. Beament*, for the plaintiff.

O. M. Biggar, K.C., and *A. C. Hill*, K.C., for the defendants.

September 15. ORDE, J.A.:—The plaintiff is the trustee of C. E. Plain Ltd. under an authorised assignment made under the Bankruptcy Act on the 16th December, 1929. The company was incorporated as a joint stock company on the 8th March, 1911, under the provisions of the Ontario Companies Act, for the purpose of carrying on the business of a general commission merchant, cold storage warehouseman, etc., and of dealing in fruits, grains, butter, vegetables, poultry, live stock, machinery, etc., etc., with an authorised capital of \$100,000 divided into 1000 shares of \$100 each.

The action is brought to set aside a mortgage given by the company on the 26th March, 1927, though dated the 1st August, 1926, to the defendant Lilian P. Kenley upon certain lands of the company, to secure the payment of \$25,000 and interest, and by her assigned on the 6th April, 1927, to the defendant the Royal Trust Company as executor of the will of the late C. E. Plain, deceased, as *ultra vires* of the company or as fraudulent and void as against the plaintiff, and also to recover the sum of \$5,392.24 in respect of certain sums paid by the company to the defendant executor in respect of such mortgage and interest thereon.

The circumstances surrounding the giving of the mortgage are somewhat unusual and require careful elaboration. For convenience I shall refer to C. E. Plain Ltd. as "the company" and to the Royal Trust Company, in its capacity of executor of C. E. Plain's estate, as "the executors."

Prior to the taking over of his business by the company in 1911, Charles Edward Plain carried on the business of a merchant in fruit and provisions at Ottawa. Under an agreement between Plain and the company dated the 20th March, 1911, Plain sold all the stock in trade, assets and effects, belonging to his business, including its real estate and goodwill, to the company for 570 fully paid-up shares (including therein the five shares subscribed for by the five incorporators of the company), having a par value of \$57,000. Of these 570 shares, 565 were to be issued to Plain and the other five to the five incorporators, one of whom was his wife, one a daughter, and the others his employees or accountants.

From this it will be seen that the company was what is sometimes called a "one-man company" or a "family company." That fact may have no bearing upon the validity or otherwise of the impeached transactions, but the mention of it serves to explain them.

No other shares than the 570 just mentioned were ever issued by the company.

When the organisation of the company and the taking over of Plain's business was completed, Plain became the president of the company at a salary, and remained so until the year 1925, when he became seriously ill.

One A. C. Brown had been in Plain's employ before 1911, and after the transfer of the business to the company he became its treasurer and assisted Plain in its management until Plain's illness in 1925, after which he took over the complete management.

On the 1st June, 1925, Plain transferred to his daughter, the defendant Kenley, 564 of his shares, which, with the one share her father had previously transferred to her, made her total holdings 565 shares, but on the same day she transferred back to her father and to two others one share each, leaving 562 shares in her name. These she continued to hold until the 8th April, 1927, when she transferred them all to the Royal Trust Company, as executor of her father's will, Plain having died on the 16th September, 1926.

The exact number of shares held by Mrs. Kenley is of no consequence, as they were all, except one share, really held by her as trustee for her father, as the subsequent transfer (which also comprised her own share) to his executor shewed. But I mention the exact number, as the facts as stated in paras. 4 and 5 of the

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formal admission of facts put in at the trial do not quite correspond with the share-register which appears near the end of the book put in as exhibit 3. I have given the numbers as recorded in the share-register.

Immediately after Plain's illness, Brown took over the management of the company, though Plain continued to draw his salary of \$6,000 until his death.

On the 6th August, 1926, there began a series of transactions which were quite out of the ordinary, and which are the basis for the attack upon the mortgage in question. Whether or not the transactions were legal or valid, notwithstanding their unusual character, is the question to be determined in this action.

On that date, at a meeting of directors at which only three, namely, Mrs. Kenley, A. C. Brown, and C. G. Young (a grandson of Plain), were present, it was resolved that the company should sell all its real estate to Mrs. Kenley for the sum of \$1, and that an agreement produced at the meeting between Mrs. Kenley, Mr. Brown, and the company be approved and be executed by the proper officers of the company. The agreement was thereupon executed by Mrs. Kenley, Brown, and the company, under its corporate seal, Mrs. Kenley countersigning as president of the company, and Young as secretary.

The agreement is dated the 6th August, 1926, and, after reciting that Brown is desirous of purchasing shares in the company and that Mrs. Kenley owns and controls 567 out of the 570 issued shares, which Brown has offered to purchase for \$35,000, and further that the company has agreed to sell all its real estate to Mrs. Kenley for the sum of \$1, which she has agreed subsequently to sell back to the company for \$25,000, it proceeds to give effect to the purpose of the agreement. The company first covenants to sell its real estate to Mrs. Kenley for the sum of \$1 free from all encumbrances. She then agrees to sell to Brown and he agrees to purchase 567 fully paid-up shares of the company for \$35,000, of which \$500 was then paid to her, and the remaining \$34,500 was to be paid on the 1st September, 1926. She also agreed to sell to the company and it agreed to buy from her the real estate for \$25,000, to be paid to her in 4 instalments of \$3,000 each on the 6th August, 1927, 1928, 1929, and 1930, respectively, and the remaining \$13,000 on the 6th August, 1931, with interest at 6 per cent. per annum, such payments to be secured by a first mortgage upon the lands. There was in this agreement a somewhat odd provision embodied in para. 8. It was agreed by that paragraph that, if Brown notified Mrs. Kenley by the 28th August, 1926, of his intention so to do, he might pay her, in addition to the \$35,000

(which he was to pay for the shares) the sum of \$25,000 (which was the same amount as the company was to pay for the reconveyance of its own real estate), and in that event the provisions of the agreement respecting the transfer of the real estate by the company to Mrs. Kenley and the re-sale thereof by her to it for \$25,000 were to become null and void. If this provision had been carried out, it would have meant in substance that Brown would be paying \$60,000 for 567 out of the 570 shares of the company, and the company's assets would remain intact, in no way affected by the bargain between Mrs. Kenley and Brown. But, if the option were not exercised, the result would be that the company would have given to Mrs. Kenley a mortgage upon its real estate for \$25,000 without any real consideration therefor.

Brown found himself unable to carry out the agreement in full. He seems to have paid Mrs. Kenley \$10,000 towards the \$35,000, the purchase-price of the shares, but nothing was done to carry out this agreement so far as the company was concerned.

On the 26th March, 1927, another meeting of directors was held, at which Brown (who was also vice-president), Young, and Mr. A. C. Hill, K.C., were present. At this meeting it was explained that the tripartite agreement of the 6th August, 1926, had not been carried out, and that a new agreement between the same parties had been prepared, which was then submitted to the meeting. It was then resolved that the company should sell lots 13 on the south side of York-street and 52 and 53 on the south side of Belmont-avenue, in the city of Ottawa, to Mrs. Kenley for \$1, and that the agreement be approved and executed by the proper officers of the company, and that, for the purpose of carrying out the terms, stipulations, and conditions of the agreement, the proper officers of the company be authorised to execute all necessary deeds and mortgages.

The new agreement was thereupon executed by Mrs. Kenley, Brown, and the company, its corporate seal being countersigned by Mrs. Kenley as president and Young as secretary.

The new agreement is dated the 26th March, 1927, and is between the same three parties as the earlier one. After recitals substantially to the same effect as the old one, the parties covenant and agree in effect as follows:—

Para. 1. The company is to sell to Mrs. Kenley all the real estate it owned on the 1st August, 1926, free from encumbrances, for \$1.

Para. 2. Mrs. Kenley is to sell to Brown 567 shares of the company's capital stock for \$35,000, of which \$10,000 is acknowledged as already paid, and the balance with interest from the

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1st August, 1926, is to be paid in monthly instalments of \$500 each up to the 1st August, 1931, when what remains of such balance is to be paid in full. Mrs. Kenley is to remain the sole owner of the shares until the whole \$35,000 with interest is paid. when she is to transfer them to Brown.

Para. 3. Mrs. Kenley is to resell to the company the same parcel of real estate for \$25,000 which is to be paid on the 1st August, 1931, with interest at 6 per cent. per annum payable half-yearly, the first payment to be due on the 1st February, 1927 (that is, calculated from the 1st August, 1926), such principal and interest to be secured by a first mortgage from the company to Mrs. Kenley.

There is no paragraph numbered 4 in the new agreement. The provisions of para. 4 of the old agreement are omitted from the new one.

Paragraphs 5, 6, 7, and 8 contain covenants of a general nature and provisions as to default.

Para. 9. Brown agrees collaterally to secure both the payment of the \$35,000 (the purchase-price of the shares) and the payment of the \$25,000 mortgage on the realty to Mrs. Kenley by transferring to her a promissory note for \$25,000 to be made or endorsed by one Joseph Moyneur, and a policy of insurance upon his (Brown's) life for \$25,000, the premiums upon which he agrees to pay.

Para. 10. Until the \$35,000 is paid for the shares Brown is to have no claim or lien thereon. (Just what this provision was intended to accomplish I cannot quite understand. It is in direct conflict with some of the rights necessarily arising from the transaction, and also with the provisions of the 12th paragraph).

Para. 11. Brown is to have the privilege of paying off the \$35,000 and interest or any part thereof at any time without notice.

Para. 12. Any dividends paid to Mrs. Kenley during the currency of the agreement are to be paid forthwith to Brown.

Paras. 13 and 14. Time is to be of the essence of the agreement and it is to be binding upon and for the benefit of the heirs. etc., of the respective parties.

It is nowhere stated in the new agreement that the earlier one was cancelled or rescinded, but that was probably the legal result, and it was so treated by the parties.

Within a few days afterwards, that is, on or before the 11th April, 1927 (for that is the date of the affidavits of execution and of registration), four documents were executed as follows:—

1. A conveyance dated the 1st August, 1926, by the company to Mrs. Kenley of the company's lands, for an expressed consideration of \$1.

2. A conveyance dated the 1st August, 1926, by Mrs. Kenley to the company of the same lands in consideration of the sum of \$25,000, expressed to have been paid by the company to her and to have been received by her.

3. A mortgage dated the 1st August, 1926, from the company to Mrs. Kenley upon the same lands, to secure the repayment to her of the sum of \$25,000, expressly stated to have been advanced to the company by her, and interest thereon.

4. An assignment dated the 6th April, 1927, by Mrs. Kenley to the Royal Trust Company as executors under the will of C. E. Plain, of the mortgage and the moneys secured thereby. The consideration for that assignment is stated to be the sum of \$25,000 and the interest then owing thereon. It is not suggested that any consideration whatever was given by the estate to Mrs. Kenley for this assignment.

On either the 6th or the 8th April, 1927 (the dates in the share-register do not correspond), Mrs. Kenley transferred to the Royal Trust Company, as executors representing the Plain estate, 562 shares, all she then held in her own name, and her son and her mother also transferred to the trust company as executors one share each.

There is no explanation of this transfer of shares by Mrs. Kenley to her father's estate. It was in the teeth of para. 10 of the agreement of the 26th March, 1927, executed only a few days before. That Brown was aware of it is disclosed by the minutes of the directors' meeting of the 11th April, 1927, at which he was present, and the fact that the transfer had been made was recorded. The shares were, of course, the property of the estate, as Mrs. Kenley held them only for her father's benefit, and it is to be presumed that Brown was always aware of this and that when he entered into the two agreements to purchase her shares he knew that Plain (who was alive when the first agreement was made) or the executors approved of the transaction. Whether this was the case or not is not relevant to the issues here.

At the same meeting of directors on the 11th April, 1927, Brown was voted a bonus of \$1,000 for his services as general manager for the preceding fiscal year, and it was also resolved to engage him as general manager from the 1st April, 1927, to the 1st April, 1928, at a salary of \$10,000 per annum.

It is to be noted that at none of the meetings of directors already mentioned is there any record that either Mrs. Kenley or

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Orde, J.A. Brown refrained from voting upon the resolutions which directly
1930. affected them. At the annual meeting of shareholders held on the
TRUSTEE 4th May, 1927, the agreement of the 26th March, 1927, and all
OF THE that the directors had done in pursuance thereof, as well as the
PROPERTY bonus to Brown and the increase of his salary, and all other acts
OF and proceedings of the directors since the last annual meeting,
C. E. PLAIN were expressly approved without any recorded dissent. The
LTD. executors of Plain were represented at this meeting of shareholders,
v. and, as they then held 564 out of the 570 issued shares, they must
KENLEY necessarily have approved or the motions could not have carried.
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Prior to April, 1927, Brown had been receiving an annual salary of \$4,000. He stated that, while his services were not increased, he demanded more salary, but says frankly that the increase of \$6,000 was to enable him to fulfil his agreement with Mrs. Kenley and to pay her the \$500 per month towards the purchase of the shares as required by the agreement.

Mr. Hill says that Brown had really been doing the work of two men, that is Plain's as well as his own, and that, in view of the fact that he had taken over the responsibilities of the business and also in view of the financial condition of the company, the directors thought the increase proper. But Mr. Hill also admitted that the directors felt that the increase would help Brown to make the monthly payments called for by the agreement.

Neither the terms of the agreement for the purchase of Mrs. Kenley's shares by Brown, nor the action of the directors and shareholders in increasing Brown's salary to enable him to carry out the purchase, can of themselves have any direct bearing upon the validity or otherwise of the dealings between the company and Mrs. Kenley with the company's real estate. But the nature of those transactions may serve to explain and illuminate the matters in issue here. A *bonâ fide* increase of a managing director's future salary could not be open to objection if the financial position of the company justified it, and especially if approved by all the shareholders, even though the increase might assist the managing director, either directly or indirectly, to purchase the assets of the company itself. The labourer would be worthy of his hire. But the coincidence of the increase and its admitted purpose, with the gift of the company's real estate to one who owned and controlled more than 99 per cent. of its capital stock, and to whom the increased payments would go in the purchase of her stock, are not wholly to be ignored when considering the validity of the impeached transaction.

One thing emerges from the intricacies of these transactions. Their whole purpose was to enable Mrs. Kenley or her father's

estate to sell and Brown to buy the business for \$60,000. The simplest method would, of course, have been to buy all the issued shares for that amount. And, according to Mr. Hill, that is what Mrs. Kenley wanted, but Brown was unable to pay that amount. And so, Mr. Hill says, the plan was eventually evolved whereby Brown was to take the money out of the company's surplus, and it was to ensure to Mrs. Kenley or the estate that this plan would be carried out that it was stipulated that Brown should give the security mentioned in para. 9 of the agreement.

There would, of course, be nothing wrong in a transaction involving the sale of the ownership or control of the business by Mrs. Kenley or the estate to Brown, merely because by its terms Brown was to get the funds for the purchase out of the profits of the business, whether by way of salary or dividend, provided the means adopted to that end did not infringe the rules governing joint stock companies for the protection of its creditors. And the question here is whether or not what was done went beyond those rules.

It will illuminate the situation if we first examine the financial condition of the company during the period of these transactions. The company had ended the year terminating on the 31st January, 1925, with a net profit for the year of \$2,191.62, which, added to the previous balance at the credit of profit and loss, made that balance \$40,583.10. The assets upon which that balance was based included \$15,000 for "goodwill" and \$5,582.94 owing by Mr. Plain. No dividend had been paid.

During the next year, that is up to the 31st January, 1926, the business was run at a loss. There was an excess of expenditure over receipts of \$3,838.79, and this notwithstanding that the salaries and wages for the year were \$14,302 'as against \$20,169.75 for the previous year. Out of the reduced surplus a dividend of 11 per cent., amounting to \$6,270, was paid. With some other deductions for depreciation, the balance at the credit of profit and loss was reduced to \$27,113.29, of which \$15,000 represented goodwill. Furthermore, this surplus depended upon the soundness of the values given to the real estate on the company's books, namely \$38,719.77. This was the situation, therefore, which confronted the directors when they made the first agreement, that of the 6th August, 1926. This agreement, it is true, was afterwards abandoned, but its effect would have been, as was that of the later one, to reduce the value of the company's assets by \$25,000, thereby reducing the company's surplus of \$27,113.29 to \$2,113.29, based, it must not be forgotten, upon a valuation of the goodwill at \$15,-

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Orde, J.A. 000. To that would of course be added the profit, if any, made during the broken period since the previous January.

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During that year, that is to the 31st January, 1927, the company made a net profit of \$4,884.91, which (after a slight deduction of \$20.58 for income tax for 1924) increased the surplus at the credit of profit and loss to \$31,977.62. The wages and salaries for that year, including certain drawings by Mr. Plain, were \$14,501.75.

That was the situation when on the 26th March, 1927, the second agreement, the one now in question, was made. And in considering the agreement in the light of the company's financial condition and prospects, it must be remembered that the new agreement, while made in March, 1927, was to be effective as from the 1st August, 1926, for interest ran from that date, and that on the same day Mr. Brown was voted a bonus of \$1,000 and his salary increased to \$10,000 per annum.

During that year, that is to the 31st January, 1928, the company made a net profit on trading account of \$651.92. Among the expenses charged before arriving at this was the sum of \$21,659 for salaries and wages, including Brown's salary of \$10,000. But, after adding this to the balance at the credit of profit and loss for the previous year, and deducting certain items "written off," the balance at credit was \$29,401.54, which was \$2,576.08 less than the credit balance the year before, or a bookkeeping loss for the year of that amount.

For some reason, not explained at the trial, neither the balance-sheet for the year 1926, nor that for the year 1927, contained any entry to shew the result of the transactions between the company, Mrs. Kenley, and Brown. There might perhaps be some excuse for omitting any such items from the 1926 statements, because the agreement of the 6th August, 1926, was never carried out, but until superseded by the later agreement it still subsisted as an apparently binding bargain and could hardly have been ignored by the company's auditors had they been aware of it.

But the omission of all reference to the agreement of the 26th March, 1927, from the 1927 statement, that is, the statement for the year expiring on the 31st January, 1928, bears a sinister aspect. Who was responsible for it was not disclosed at the trial. No bookkeeping entries could have been made or the auditors would have set forth the effect of them in the annual statement. The result, of course, would be that the balance at the credit of profit and loss would have been \$25,000 less, so that the credit balance on the 31st January, 1928, ought to have been only \$4,401.54, instead of \$29,401.54. And I cannot find in the state-

ments for 1926 and 1927 any increase in the item for interest over the amounts paid during 1924 and 1925 to indicate that the interest on the mortgage to Mrs. Kenley had either been paid or taken into account as a liability, so that the amount at credit of profit and loss account would be so much further reduced.

The company's auditors, prior to the annual meeting in 1925, had been Messrs. Denison, Holcomb & Co. Mr. Denison and Mr. Holcomb had in fact been two of the five charter members of the company in 1911, each holding one share. But Mr. Holcomb transferred his share to Mr. Plain immediately upon the organisation of the company, and Mr. Denison transferred his share to Mr. Brown in 1916. For the years 1925, 1926, and 1927 another auditor had examined the books and prepared the annual statements and balance-sheets.

But in 1928, Messrs. Denison and Holcomb were again appointed, at the annual meeting of shareholders held on the 4th January of that year.

In 1929 there was some delay in calling the annual meeting of shareholders. Mr. Hill says that he was pressing Brown to call the meeting and that Brown had said he could not get the annual statement. Later Brown brought him the pencilled statement for the year ending the 31st January, 1929 (exhibit 8), which had been prepared by Denison, Holcomb & Co. Mr. Holcomb says that he discovered the existence of the \$25,000 mortgage by accident. There was no entry of it in the company's books, and he thought that it had been given by way of guarantee to secure Brown indebtedness to the Plain estate. He accordingly made an entry at the foot of the pencilled statement to indicate the existence of this mortgage as a contingent liability. This in no way affected the balance-sheet itself. The statement was sent to the manager of the Bank of Nova Scotia, to which the company was indebted, and it came back to Mr. Holcomb, with a memorandum upon it in red ink from Mr. Hill to the effect that the memorandum as to the mortgage was "entirely incorrect and not in accordance with the facts."

Mr. Hill says that he was astounded to find that the transaction had not appeared in the previous statements. Brown told him it had not been entered in the books, and Hill told Brown that it ought to appear, and he therefore made the red ink memorandum already mentioned, and the statement was then returned to Mr. Holcomb.

The auditors thereupon rubbed out the pencilled memorandum as to the contingent liability (it still appears faintly upon exhibit 8), and altered the balance-sheet by entering the mortgage upon

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it. The result was that, coupled with the business loss for the year of \$10,058.40, and notwithstanding a bookkeeping increase of \$4,451.53 given to the value of the real estate, the deductions turned the bookkeeping credit balance of \$29,401.54 of the 31st January, 1928, into a debit balance of \$1,436.13 on the 31st January, 1929. And the assets still included the sum of \$15,000 for "goodwill," a rather nebulous piece of property for a company on the verge of insolvency.

That the company was rapidly drifting into the bankruptcy which took effect in the following December is apparent, not only from this statement for 1928, but from the later statement for the 6 months ending the 31st July, 1929, during which there was a further loss of \$9,293.16.

There is a further admission of fact which ought to be mentioned before I deal with the issues involved. By para. 16 of the formal admissions put in as exhibit 1, it is stated that all the debts owing by the company on the 1st August, 1926, and on the 26th March, 1927, have since been paid, and that no creditors whose debts were owing on either of those dates were defeated, hindered, or defrauded by reason of the conveyances or of the mortgage, and that the company was able to pay such debts without the aid of the property comprised in the impugned transaction.

What the admission means is quite plain; but, strictly speaking, it is inaccurate because the impugned transaction itself created an indebtedness as of the 1st August, 1926, which has not been paid.

The transaction is attacked upon two alternative grounds, namely, that it is *ultra vires* of the company, and that it is fraudulent and void as against the plaintiff.

If by the allegation that the transaction was intended to defraud the creditors of the company it was sought to bring it within the Statute of Elizabeth so far as future creditors were concerned, I think the plaintiff would fail. No evidence was adduced sufficient to establish any deliberate intent to defraud such as would bring the transaction within that statute, R.S.O. 1927, ch. 134.

But we are dealing here with a limited joint stock company; and a transaction, not in any way fraudulent within the Statute of Elizabeth, may be constructively fraudulent as against future creditors because it violates some fundamental principle of law governing the constitution and management of such a company. And in dealing with this transaction from that aspect, as I propose to do, it is not quite proper to treat the two grounds raised by the pleadings as if they were alternative or as if each excluded the other, because they may really be co-related. If the term

ultra vires is used here, not in its primary application to the powers of the company as a corporate body, but in its secondary application to the irregular exercise by the directors or the shareholders of their powers or rights within the company, then the mode of effecting a transaction which defeats creditors may, in the circumstances, be held to have been *ultra vires* of the directors because of the irregularity of the procedure adopted for carrying it out.

There is no more important general principle governing the permission given by law to a group of persons to limit their liability to creditors by forming themselves into a limited joint stock company, than that they should keep unimpaired the capital upon which creditors are to depend for payment.

And, while an individual may, broadly speaking, do what he pleases with his own (that right is in many respects restricted even in the case of an individual where creditors are affected), a limited joint stock company cannot do what it likes with its property, but must deal with it according to the laws governing its constitution. It cannot lawfully give away its property, either to shareholders or others. I am speaking broadly, because there are cases where, in the interests of its own business, a company may give bonuses to employees or gifts to charities, but transactions of that character either depend upon the fact that they are prudent and proper business expenditures or are made out of accumulated profits and with the consent of the shareholders.

Mr. Biggar, in his very able argument, relied upon the fact that the business belonged to the Plain family; and contended that, if there had been no company organisation, the transaction would not be open to question; and that the whole attack was based upon the fact that there is a company.

That is all quite true, but the first and obvious answer to that argument is that if there had been no company the transaction could not have taken place. The Plain family could not have escaped liability for the debts incurred by a business carried on by themselves by mortgaging the business to themselves for an illusory consideration. And it is carrying the family argument pretty far if you can justify a departure from all the ordinary rules governing the management and disposal of a company's property upon the ground that all the shareholders comprise one family and in the same breath rely upon the strictness of the law which limits the family's liability to the company's creditors.

The attack upon the transaction is in very truth based upon the fact that the assets in question belonged to a company. And it is because a limited liability company cannot be permitted to

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deal with its property in the way this company did and in the circumstances surrounding the transaction, that the transaction must, in my judgment, be set aside.

Mr. Biggar argues that the form of the transaction does not matter, and that if the company had declared a dividend of \$25,000 out of the balance at the credit of profit and loss, and the shareholders had accepted a mortgage for that amount, the transaction would be valid. That might possibly be the case, though the declaration of so large a dividend might possibly have involved the directors in an inquiry whether or not it in fact constituted a dividend out of capital, having regard to the real value of the company's assets and their *bona fides* in declaring it.

The case of *Re Dorenwends Ltd.* (1924), 55 O.L.R. 413, was mentioned several times during the argument. There is really no parallel between that case and this. The outstanding feature of that case was that \$8,000 of surplus was converted into fixed capital by the issue of that amount of paid-up stock against it; and, while the procedure adopted for carrying out the transaction was not wholly regular, the result, instead of injuring the creditors, enured to their benefit because it increased their security by that amount of additional fixed capital.

The only ground upon which the validity of this transaction can rest is that it was in substance a distribution of profits or surplus by way of dividend. Mr. Hill, in the course of his evidence, says that the provision of the agreement with regard to the land was a distribution of surplus.

If this is what was intended, it is odd that nowhere in the agreement itself or in the minutes of the directors' and shareholders' meetings or in the books of the company was the transaction so regarded. It takes the form of a sale of a specific asset to the largest shareholder for the sum of \$1, though the asset is valued in the books at \$37,000 or thereabouts; followed by an immediate resale to the company of the same asset for \$25,000 which the company secures by a mortgage thereon. Why all this juggling? How could the directors justify a sale of \$37,000 worth of property for one dollar? If the transaction had stopped there, it would have completely wiped out the book surplus, either of the 31st January, 1926, or the 31st January, 1927. The repurchase for a consideration of \$25,000 of the same property, not as a distinct bargain, but as one of the terms of the same bargain, and the giving of a mortgage to secure that so-called purchase-price, is altogether illusory. What really took place was that the company gave Mrs. Kenley a mortgage for \$25,000 without any consideration whatever. It owed her nothing. To say that all

this constituted a distribution of profits by way of dividend is nonsense. Even if the company and Mrs. Kenley were not completely estopped by the very language of the documents themselves, which treat the transaction as a sale, a re-sale, and a mortgage, there is not, as I have said, a single word anywhere to indicate that a dividend was being declared out of surplus. There is, of course, as I said in the *Dorenwend* case at p. 423, no magic in the word "dividend" and no special form of words is necessary when declaring one. But there must surely be, at least, some resolution or action on the part of the company or its directors indicating an intention to reduce the surplus profits by the amount of the so-called dividend.

If there was a dividend here, what was it? Was it the gift, for that is what it was, of the company's lands valued at \$37,000? If so, the company had no power to declare a dividend in specie in that way. Was it the incurring of the liability to pay \$25,000 by way of purchase-money for the lands it had just given away? By no stretch of the imagination can that be regarded as a declaration of dividend. Or was it what the transaction was, in substance, the giving of a mortgage upon the company's lands (the two illusory sales being disregarded) to secure the payment of \$25,000 alleged to have been advanced by Mrs. Kenley to the company, but which had not been advanced either actually or in theory, and which was not in any legal aspect whatever owing by the company to her?

Had there been in some form or other, no matter how irregular, any resolution indicating an intention to distribute \$25,000 out of surplus to the shareholders, sufficient to found a legal liability to pay the same and therefore constituting a debt of the company, the shareholders might have agreed to leave the money in the coffers of the company as a loan to the company and take a mortgage to secure its future payment. And it might be that if the mortgage itself had recited the fact that there was a surplus and that with the assent of all the shareholders \$25,000 of it was to be divided among the shareholders but was to be by them lent to the company and its payment secured by mortgage, the transaction might stand. But I find it difficult to see how a mortgage which purports to secure the repayment of money alleged to have been advanced can be justified, when no moneys were advanced at all, and there was in fact no antecedent liability to Mrs. Kenley upon which to base the fiction that the company had paid her the money by way of dividend and she had immediately lent it to the company.

The circumstances surrounding the transaction all accentuate

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the impropriety of it. Had the alleged declaration of dividend been made in the usual manner, it would hardly have escaped the bookkeepers and auditors of the company. Had the balance-sheets for the years 1926 and afterwards shewn the transaction, the present debts of the company might never have been incurred. It is evident that the company's bankers were getting uneasy early in 1929, and it is probable that a disclosure to them in 1926 or 1927 of this transaction might have put a stop to further advances and so brought the company's business to an end.

It is argued that Mrs. Kenley or her father's estate ought not to suffer because of the failure of the directors to see that the company's books and the earlier balance-sheets disclosed the transaction. But I think that both she and the estate, by reason of their control of the company and their representation upon the board of directors, must be held to have had full knowledge of what was done, and that they are bound by the omission and the effect of it upon the creditors.

To sum up the conclusions to be deduced from what I have said, I am of the opinion that the transaction carried out in the manner attempted by the company and Mrs. Kenley, by reason of its irregularity and the secrecy surrounding it, must be regarded, if it is allowed to stand, as having the effect of so impairing the capital of the company as to constitute a fraud upon its creditors both present and future. It was, in my judgment, beyond the powers and authority of the directors and of the shareholders to enter into any such transaction with one of the shareholders which in the circumstances in which it was made and was attempted to be carried out, and having regard to the failure to disclose it in the books and balance-sheets, had the effect of destroying the fundamental security which the law requires joint stock companies to preserve intact for the protection of their creditors. It is upon that broad general principle that my judgment is based. The transaction, in my judgment, however honest its intention may have been, constituted in effect a fraud upon the company and the company's creditors and ought not to be allowed to stand.

Certain moneys had already been paid by the company to the Plain estate, amounting in all to \$5,392.34. Of these, certain sums representing interest were paid by the executors to Mrs. Plain under C. E. Plain's will. The plaintiff is entitled to recover from the executors the sums so paid with interest, limited however to the estate now or hereafter in the hands of the executors to be administered. If the total amount so paid by the company cannot be recovered from the estate, then the plaintiff ought to be at liberty to recover any deficiency from Mrs. Plain.

There will therefore be judgment for the plaintiff:—

1. Declaring the mortgage in question invalid and directing that it be set aside.

2. Against the defendant the Royal Trust Company as executor for the sum of \$5,392.34 and interest at 5 per cent. upon the respective sums making up that amount, from the dates when they were respectively paid by the company to the date of this judgment, limited in the usual way to such assets as are now in or may hereafter come to its hands as executor.

3. Against both defendants for the costs of this action, limited as to the defendant company as above.

4. And the judgment may declare, if it is deemed necessary, that it is without prejudice to the right of the plaintiff, if any, to recover from Mrs. Plain any moneys which it fails to recover under the foregoing judgment against the executors, to the extent of such moneys as have been paid her out of the moneys paid by the Plain company.

Orde, J.A.

1930.

TRUSTEE
OF THE
PROPERTY
OF
C. E. PLAIN
LTD.
v.
KENLEY
AND
ROYAL
TRUST
Co.

[GARROW, J.]

WALKER v. ELLIOTT.

1930.

Sept. 15.

Fraud and Misrepresentation—Agreement for Purchase of Property and Business—Action by Purchaser for Rescission—Election to Affirm after Knowledge of Fraudulent Misrepresentations—Failure of Action—Repossession by Vendor—Claim to Retain Part of Money Paid—Forfeiture Clause in Agreement—Equitable Relief—Contract to be Carried out at Reduced Price—Alternative Remedy in Damages.

The plaintiffs in September, 1928, agreed to buy from the defendant a garage property (land, building, business, and stock) for \$13,000, \$3,000 down and the balance in half-yearly instalments with interest. Instead of paying the \$3,000 at once, the plaintiffs gave a chattel mortgage for the amount, and in the spring of 1929 paid the defendant \$3,200 in discharge of the mortgage and on account of the purchase-price. The plaintiffs took possession of the premises on the 1st October, 1928, and endeavoured to carry on the business, but soon found that they could not do so profitably, and in August, 1929, returned the keys of the premises, and began this action to set aside the agreement and for the return of the money paid, on the ground that the sale was induced by the false and fraudulent representations of the defendant:—

Held, that some of the representations made by the defendant were false and fraudulent and were relied upon by the plaintiffs; but they were of no avail to the plaintiffs so far as the claim for rescission was concerned, in view of the admission of one of the plaintiffs that he knew the worst and had determined to make the best of it before he paid the \$3,200—he had, with his eyes open, elected to affirm a contract which he might have escaped from, and he must abide by that election.

The defendant had retaken possession of the premises, and proposed to retain the \$3,200 by virtue of a clause in the agreement which forfeited all money paid should the purchaser make default:—

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Held, following *Webb v. Roberts* (1908), 16 O.L.R. 279, that the plaintiffs should be given another opportunity of escaping from the consequences of the provision for forfeiture, and should, if they so elected, be permitted to acquire the property from the defendant upon paying its true value; or, if the defendant had parted with the property, the plaintiffs should recover from the defendant damages arising from the fact that from October, 1928, until the 1st March, 1929, they were in possession of a business represented to them as worth at least \$2,500 a year in profits, whereas the true amount of profits were not more than half that.

In this action the plaintiffs, Peter Taylor Walker and his son Alexander Walker, sought to set aside a certain agreement of sale and purchase dated the 25th September, 1928, whereby the defendant agreed to sell and convey to them and they agreed to purchase a certain garage property in the town of Port Hope, upon the ground that the said sale was induced by the false and fraudulent misrepresentations of the defendant. They also asked for judgment in their favour for so much of the purchase-price as had been paid by them, some \$3,250, and a further sum of \$2,000 as damages.

The action was tried by GARROW, J., without a jury, at Cobourg.

F. M. Field, K.C., and *T. N. Phelan*, K.C., for the plaintiffs.

G. N. Gordon, K.C., for the defendant.

September 15. GARROW, J.:—The plaintiff Peter and his family came from Scotland a number of years ago. He is a mechanic by trade, but the family engaged in farming and had accumulated a little money. They had decided to give up farming before they met the defendant, and, seeing his advertisement in a Toronto newspaper, Peter wrote the defendant and the latter called and spent some time discussing the matter in a general way without any price being named for the garage property.

In the following week the two plaintiffs went to Port Hope and saw the defendant at the garage. On this occasion the defendant said, so the plaintiffs say, that it was one of the best stands between Toronto and Montreal for the sale of gas, and that one man was kept busy looking after the sale of gas and oil alone. He also said that \$4 or \$5 worth of repair parts were sold every day. The plaintiffs at the invitation of the defendant spent a few minutes looking over the books, which seemed to indicate so far as they were able to judge that a good business was done.

By this time the defendant had got the length of naming a price of \$13,000 for the building and the business and stock, but at least one if not two subsequent meetings took place before the

parties came to terms. On one or more of these occasions, I find as a fact, notwithstanding the denial of the defendant, that he told the plaintiffs that he had been offered \$25,000 for the land alone by the Canadian Oil Company and that the reason he did not accept this was that he would have been obliged to remove the buildings. I find also that this statement was untrue, but I find further that Walker senior, at least, did not believe the statement and was not influenced by it in making the agreement.

I also find that the defendant stated that he was making "all kinds of money;" that in the preceding year he had drawn \$2,500 out of the business and "that easily that much more had been stolen by some one;" that the property was well worth the \$13,000 he asked for it; and that Walker and his two sons would find that there was enough business to be done there to keep them all busy and additional help besides. He explained the low assessment of \$3,000 by saying that he was a member of the council and "had a little pull."

Finally on the date mentioned a bargain was struck and the agreement drawn up and executed whereby the plaintiffs were to pay \$13,000 for the property—\$3,000 down and the balance in equal consecutive half-yearly instalments of \$250 with interest upon the unpaid purchase-money at 6 per cent. Instead of paying the \$3,000 at once, the plaintiffs gave the defendant a chattel mortgage for this amount on their farm stock and implements. When the chattels were sold in the following spring, the defendant was paid the \$3,000 and interest.

Possession of the garage premises was taken by the plaintiffs on the 1st October. Walker senior remained on the farm and sent his son John (not Alexander, the co-plaintiff) to assist Harcourt, who had been in the defendant's employ and who was engaged by the plaintiffs to remain on. Within 4 or 5 months Walker senior had to put into the business another \$400, and on the 1st March he sent his son Alexander down to take charge and got rid of Harcourt, not, as I understand it, because of any fault he had to find, but because he could not afford to keep him on. It soon appeared that there was not enough work for the father and the two sons. Alexander left, the father struggled on until August, and then gave up.

The father says that he felt by January, 1929, that he had been deceived. By February he was convinced of it. About this time he advertised the sale of his chattels; and, on his receiving a letter from the defendant claiming out of the proceeds the amount of his chattel mortgage, he wrote the defendant a letter (exhibit 8) dated the 11th February, 1929, in which he assured the de-

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Garrow, J. fendant that he (the defendant) would be paid in full. He said:
1930. "I had to have a sale before I could meet the payment on March
1st. I know my responsibilities and I intend to do what is fair
and square. Your mortgage will not be affected in any way, as
WALKER v. you will have your money just as soon as it can be arranged." He
ELLIOTT. then proceeds to ask Elliott to look up a house for him and his
family in Port Hope, and concludes by assuring him "that we will
live up to our agreement."

And Walker, being, as I think, quite honest, did shortly afterwards pay the defendant \$3,200 in discharge of the mortgage and on account of the purchase-price. I am satisfied, upon his own evidence, that, when he wrote the letter referred to and later made this payment, he knew that the business had been greatly misrepresented; but, to use his own expression, he had determined to make the best of a bad bargain.

That the price of \$13,000 was greatly in excess of the real value of the property, even making a generous allowance for the kind of talk that a vendor is permitted to indulge in, I am satisfied upon the evidence of Harcourt, Hall, Low, and Stevens, the assessor. The defendant bought it in 1919 for \$2,200. Subsequently he sold it to Hall for \$8,000, got \$800 paid down, and later took the property back. He negotiated, he says, with the Canadian Oil Company for a price of \$7,200, but some objection was made as to the title, and the sale fell through. His next prospective purchaser was the Walker family.

I was not at all favourably impressed with the defendant in the witness-box. His evidence was marked with frequent use of such expressions as "I might have done so;" "I don't remember;" "I cannot recall"—when pressed by counsel on cross-examination in regard to important points—and, as between him and the plaintiff Walker senior, I have no hesitation in accepting the latter's testimony where he disagrees with the defendant.

Moreover, I hold that the evidence of Harcourt is to be accepted when he states that in effect the defendant deliberately padded his books in order to deceive or mislead a purchaser, and that he arranged things when the plaintiffs made their inspection in such a manner as to present a fictitious appearance of prosperity by the use of what Harcourt called bogus repair jobs. I doubt if the padding of the books deceived the plaintiffs, because, even if capable of making a full examination of them, they spent but a few minutes doing so. But that the defendant did adopt the methods I have spoken of, I feel satisfied. He warned Harcourt that the plaintiffs were coming to look over the property and to say nothing about the business and to present an appearance of

activity. Harcourt says that, in his opinion, a fair price for the property is \$6,000; that, instead of \$4 or \$5 a day for the sale of parts, a more accurate figure would be about 5 cents a day; and that the \$2,500 profit in a year is ridiculous.

Harcourt may have some feeling against the defendant, who is his creditor in a long amount, and it is true he did not disclose what he now says about the books until after this action commenced, and that he in effect stood by and permitted the plaintiffs to be taken in. Nevertheless I believe that what he now says is substantially the truth.

The defendant points out, as a reason for the plaintiffs' non-success, that Walker senior neglected the business for months after his purchase and made the mistake of leaving it in charge of a young boy and that other well-known gas and oil station concerns set up branches close by shortly after the agreement was executed. To some extent both these matters affected the ultimate result. But the prime cause was the gross over-valuation placed by the defendant upon the property and the business done there.

In the end the plaintiff Walker senior returned the keys of the premises, and on the same day issued the writ in this action. He did not, at any time prior to this, complain to the defendant of having been defrauded, although after he came to live in Port Hope he saw or might have seen him frequently.

The defendant has apparently retaken possession of the premises and has again advertised them for sale over his own name. He proposes to retain the \$3,200 paid under the clause in the agreement which forfeits all money paid should the purchaser make default. Although the defendant counterclaimed for the balance of the purchase-price, he abandoned that claim at the trial. He could not well have both the property and its extravagant value as well.

Notwithstanding the findings of fact which I have made as to the misrepresentations, fraudulent as I think some of them were, and relied upon by the plaintiffs, except as to the offer of the Canadian Oil Company, as they also were, they are, I think, of no avail to the plaintiffs so far as the claim for rescission is concerned, in view of Walker senior's own admission that he knew the worst and had determined to make the best of it before he made the payment of \$3,200. If he had acted promptly, I am satisfied he would have been entitled to rescission; but, in my view, he, with his eyes open, elected to affirm a contract which he might have escaped from, and he must abide by that election.

But does that necessarily end the matter and leave the plaintiffs with no relief, and is the defendant to be entitled to keep the

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Garrow, J. property and reap the benefit of his own wrongdoing to the extent of the \$3,200 paid?
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The case, not referred to on the argument, of *Webb v. Roberts* (1908), 16 O.L.R. 279, seems to afford an answer to that question favourable to the plaintiffs. In that case a vendor brought action to recover possession of lands agreed to be sold by him to the plaintiff, who had purchased on the strength, it was found, of certain fraudulent misrepresentations. After knowledge of the real facts, he had continued to make payments, but had finally made default while still claiming the right to retain possession. The trial Judge held that he had ratified the contract and could not have rescission, but on his counterclaim allowed him damages for the deceit practised upon him to the extent of the moneys paid, less an occupation rental. On appeal to a Divisional Court composed of Boyd, C., Mabee and Anglin, JJ., it was held by the Chancellor that this was in effect rescission and that the damages allowed were based upon an erroneous principle, and by Anglin, J., that the moneys paid had been lost to the purchaser, not by reason of the vendor's deceit, but because of his, the purchaser's, own failure to carry out the agreement. But they both agreed, as did Mabee, J., without giving reasons, that, notwithstanding that the agreement provided for forfeiture, upon default, of all moneys paid, the purchaser should be given another opportunity of escaping from the consequences of that provision, and should, if he so elected, be permitted to acquire the property from the vendor upon paying its true value. It was pointed out by Anglin, J. (now Chief Justice of Canada), that this was not making a new contract between the parties, but was in effect allowing one party to a contract who had been wronged by deceit inducing the contract to carry out the contract and recover compensation for the deceit by way of damages to be set off against the contract price.

I see no reason for not adopting the same course here, provided the defendant has not already disposed of the property elsewhere. I would fix the fair value of the premises and business sold at \$8,000, the highest offer the defendant had obtained prior to coming in contact with the Walkers, and several thousand dollars above the assessed value. The difference of \$5,000 is the amount of damages the plaintiffs would have been entitled to had the contract been performed. Upon the plaintiffs electing within two weeks to carry out the contract upon these terms, there will be judgment declaring that on payment of the balance of the price, less the \$5,000, and less of course the \$3,200 already paid, the plaintiffs will be entitled to a conveyance of the lands, the payments to be made as in the *Roberts* case, at the same dates as

provided for in the agreement, and with interest at the same rate, but proportionately reduced in amount.

If this is not accepted by the plaintiffs, or if in the meantime the rights of third parties have intervened and it cannot be carried out, then, still adopting the alternative course followed in the case already referred to, I would allow to the plaintiffs damages arising from the fact that from October, 1928, until the 1st March, 1929, when at latest they were aware of the situation, they were in possession of a business represented to them as worth at least \$2,500 a year in profits, to say nothing of the like amount said to have been stolen, whereas the fact is upon the evidence that the profits for 17 months during the defendant's time were only some \$1,850 or just about one-half the \$2,500 a year. The damages which I would allow in this connection I fix at \$500.

In addition to his counterclaim for the balance due under the agreement, which, as stated, was abandoned at the trial, the defendant also claimed upon a promissory note for \$300. This claim was not disputed, and the defendant should have judgment for this sum with interest.

The plaintiffs are also entitled to a small sum for repairs, \$15.60.

There will be judgment therefore in accordance with the foregoing reasons, and the plaintiffs are entitled to their costs of the action.

[IN CHAMBERS.]

RE A SOLICITOR.

Solicitor—Bill of Costs—Application for Taxation after Lapse of a Year from Payment—Solicitors Act, R.S.O. 1927, ch. 194, sec. 34—General Jurisdiction of Court over Solicitors apart from Act—Fraud or Gross Misconduct not Charged—Dismissal of Application—Costs.

A solicitor's bill of costs was adjusted and settled and paid in the lifetime of the client, on the 20th November, 1928. On the 21st August, 1930, the widow and executrix of the client launched an application for taxation of the bill:—

Held, that the application, not being made within a year from the date of payment, as required by the Solicitors Act, could not succeed.

In re Sutton (1883), 11 Q.B.D. 277, followed.

Solicitors being officers of the Court, and the Court having general jurisdiction over them, there is jurisdiction to order taxation quite apart from the provisions of the Solicitors Act. But, before this jurisdiction can be invoked, fraud or gross misconduct sufficient to justify the exercise of the Court's disciplinary powers over its own officers must be established—a mere mistake in judgment as to the course to be pursued falls far short of what is required.

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The application was dismissed without costs — more than \$400 deducted from a sale-price of \$1,100 was some justification for a complaint.

MOTION by the widow and executrix of a client of the solicitor for an order for the taxation of a bill of costs.

September 12. The motion was heard by MIDDLETON, J.A., in Chambers.

Charles M. Garvey, K.C., for the client.

M. R. Medline, for the solicitor.

September 16. MIDDLETON, J.A.:—The bill of costs was adjusted and settled and paid during the lifetime of the deceased. The amount of the bill is considerable, having regard to the subject-matter of the transaction, but the individual items constituting the bill are not pointed out as being in any case excessive.

The deceased client was the owner of a small parcel of land, and had been in possession for many years. The title was, no doubt, satisfactory, but in a very unsatisfactory condition because it depended upon several intestate successions. The purchaser, it is said, desired to raise a portion of the purchase-money upon a mortgage. The mortgagee's solicitor refused to accept the title unless it was brought under the Land Titles Act, and the client agreed that the title should be brought under the operation of that Act, although advised that proceedings to bring that about would of necessity be expensive. The bill in question, amounting to \$106, is for the proceedings taken. Of this amount \$147.22 is for out-of-pocket disbursements. The gist of the complaint is that the solicitor ought to have advised the client against taking these proceedings, and, when the proceedings were taken, he should not have followed the rulings of the Master of Titles as to the necessity of a number of ancillary proceedings, but should have appealed from his directions. This relates to the suggestion that the letters of administration to the estates of owners of interests in the land, who died before 1886, were not in fact necessary. The amounts in the various individual cases were not large, being \$15 for solicitor's fees together with the usual disbursements.

The adjustment of the account, followed by the release signed by the client, took place on the 20th November, 1928. This application was not launched until the 21st August, 1930.

Objection was taken by the solicitor that the application was not made within a year from the date of payment, as required by the Solicitors Act, and this objection is, I think, fatal: *In re Sutton* (1883), 11 Q.B.D. 377.

Unquestionably there is jurisdiction to order taxation quite apart from the provisions of the Solicitors Act, because solicitors are officers of the Court and the Court has general jurisdiction over them. This jurisdiction, however, is not to be invoked in every case in which the provisions of the statute are an answer; and, before it can be invoked, a proper case must be made out. This involves the establishment of fraud or gross misconduct sufficient to justify the exercise by the Court of its disciplinary powers over its own officers. A mere mistake in judgment as to the course to be pursued in a matter of this kind falls far short of what is required. I would refer to the decisions of *Storer & Co. v. Johnson* (1890), 15 App. Cas. 208; *Re Robinson* (1896), 17 P.R. 137; *In re Park* (1889), 41 Ch. D. 326; *Re McBrady and O'Connor* (1899), 19 P.R. 37.

I would therefore dismiss the application, but I think there is sufficient in the case which would justify my withholding costs. Over \$400 deducted from a sale-price of \$1,100 is some justification for a complaint by this widow.

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[APPELLATE DIVISION.]

REX V. BAER.

1930.

Criminal Law—Offence against Militia Act—Doing Act to Detriment of Militia Officer—Magistrate's Conviction—Appeal upon Stated Case—Forum—Judge in Chambers—Further Appeal to Appellate Division upon Leave Given not Competent.

Sept. 18.

The defendants were convicted by a police magistrate, under sec. 121(e) of the Militia Act, R.S.C. 1927, ch. 132, of having done an act to the detriment of E., a militia officer, as a result of his having performed a military duty. The defendants, being members of the executive of the local council of a trade union, fined E. for playing in a regimental band with musicians who were not members of the federation. Upon a case stated by the magistrate, the defendants appealed from the conviction to a Judge of the High Court Division in Chambers, who affirmed the conviction upon the merits. The defendants obtained leave from the Judge in Chambers to appeal and did appeal from his order to the Appellate Division:—

Held, that the appeal, upon a stated case, from the conviction was properly brought before a Judge in Chambers, his decision was final and conclusive, and he had no authority to grant leave to appeal: Criminal Code, secs. 705(e), 765, 766.

Rex v. Red Line Ltd. (1930), 65 O.L.R. 11, distinguished.

THE defendants, Baer and five other men, were charged before the Police Magistrate for the City of St. Catharines, under sec. 121 (e) of the Militia Act, R.S.C. 1927, ch. 132, with having done an act to the detriment of one Lieutenant F. T. Egner.

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bandmaster of the Lincoln regimental band, at St. Catharines, as a result of his having performed a military duty.

The defendants were members of the executive of the local council of the American Federation of Musicians, and as such fined Egner under the union by-laws for playing in the regimental band with musicians who were not members of the federation. As a result the defendants were charged before the Police Magistrate, and were convicted and each fined the sum of \$50 and costs. Subsequently they applied to the magistrate and obtained a stated case on the question whether or not Egner was performing a military duty, within the meaning of the Militia Act, in parading with the regimental band on the 11th July, 1929.

The defendants' appeal from their conviction was heard, upon the case stated, by McEvoy, J., in Chambers, on the 23rd May, 1930.

An objection to his jurisdiction was taken, on the ground that the appellants had not complied with the provisions of sec. 761 of the Criminal Code. Without ruling upon the preliminary objection, the learned Judge heard the merits, and dismissed the appeal from the conviction.

The defendants appealed (by leave) from the order of McEvoy, J.

September 18. The appeal came on for hearing before MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, JJ.A. *G. T. Walsh*, K.C., and *D. F. Pepler*, for the appellants.

J. J. Bench and *W. B. Common*, for the magistrate, respondent, objected that no appeal lay.

THE COURT quashed the appeal without costs, MULOCK, C.J.O., saying that secs. 761 *et seq.* of the Criminal Code enable an accused person to obtain a stated case for the opinion of "the Court," i.e., "any superior court of criminal jurisdiction for the Province:" sec. 705 (*e*).

By sec. 766 (2), the authority and jurisdiction of the Court may, subject to any Rules of Court, be exercised by a Judge in Chambers, whose decision "shall be final and conclusive upon all parties:" sec. 765.

There are no Rules of Court in any way qualifying the operation of the statute, so that the jurisdiction of the Judge in Chambers and the finality of his decision are free from doubt.

Rex v. Red Line Ltd. (1930), 65 O.L.R. 11, need not be here considered, as the prosecution there was under a municipal by-law,

and the effect of provincial statutes, which here have no application, had to be considered.

The learned Judge in Chambers here gave leave to appeal. His decision being final and conclusive, he had no authority to do so, and he could not in this way confer upon this Court a jurisdiction which did not otherwise exist.

Order quashing the appeal.

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C.J.O.

[LOGIE, J.]

MILES v. ZUCKERMAN.

1930.

Sept. 25.

Guaranty — Document Signed by President of Company — Whether Personal Guaranty of Debt of Company — Whether Guarantor Released by Extension of Time Given to Company by Creditor—Extension Personally Arranged by Guarantor with Creditor — Assent to Extension—Admission of Extrinsic Evidence.

The plaintiff entered into a contract with an incorporated building company for the installation of heating equipment in certain houses in course of erection. When the plaintiff had substantially completed his work under the contract, the company was behind in its payments to the plaintiff, and the defendant, the president of the company, promised to give the plaintiff his personal guaranty of the plaintiff's account. The defendant accordingly wrote a letter to the plaintiff in which he said, "I shall personally see to it that you get your payments regularly as per contract," and signed it, "City Builders Ltd., per Charles Zuckerman." It was admitted that the name "Charles Zuckerman" was in the defendant's handwriting, while the rest of the letter was in typewriting; that there was consideration for a guaranty; and that the document was sufficient in form. Extrinsic evidence of the surrounding circumstances and of the defendant's intention was admitted at the trial of an action upon the guaranty:—

Held, that the document was not a guaranty by the company of its own account, and that the signature was sufficient to charge the defendant personally.

The document would be meaningless if read as a guaranty by the company of its own debt; and the construction most favourable to the validity of the instrument should be adopted.

Elliott v. Bax-Ironside, [1925] 2 K.B. 301, and *St. Lawrence Steel and Wire Co. v. Leys* (1903-4), 6 O.L.R. 235, 7 O.L.R. 72, applied.

It was contended that the plaintiff, by accepting notes and renewals, thus giving as an indulgence an extension of time, discharged the defendant as surety:—

Held, that the defendant, having personally arranged for the giving and acceptance of the notes and having personally made payments from time to time, was debarred from saying that in his capacity as president he obtained an extension, but that in his personal capacity he was released because of that extension—in negotiating the extensions of time on behalf of the company, he assented in his capacity of surety to each renewal at the time it was given.

Clark v. Devlin (1803), 3 B. & P. 363, followed.

1930.

AN action upon a guaranty.

MILES

v.

ZUCKERMAN.

The action was tried before LOGIE, J., without a jury, at a Toronto sittings.

H. J. Macdonald, for the plaintiff.

B. Luxenberg, for the defendant.

September 25. LOGIE, J.:—About the 21st day of December, 1928, the plaintiff entered into a contract with City Builders Ltd. for the installation of heating equipment for 12 houses in course of erection in Rusholme-drive, Toronto, for the sum of \$6,500. On or about the 11th day of April, 1929, the plaintiff's contract being substantially completed, the company were in arrears with regard to the payment to the plaintiff under the contract, and the defendant, who was the president of the company, had certain interviews with the plaintiff, in the course of which, and in order to induce the plaintiff to proceed with the completion of the work notwithstanding the arrears, he undertook to give the plaintiff an order on the mortgagees with respect to moneys unadvanced by them. This order was given by the company to the plaintiff, but immediately thereafter the defendant approached the plaintiff and requested the plaintiff to refrain from notifying the mortgagees of the said order, and, in consideration thereof, promised to give the plaintiff his personal guaranty of the plaintiff's account, and this was alleged to be done by a letter dated the 11th day of April, 1929. After the letter was given, certain payments were made, and it is now admitted that the amount due by City Builders Ltd. to the plaintiff is \$3,580 and interest. At the time the alleged guaranty was given, the plaintiff held certain notes of City Builders Ltd., who have since, according to the statement of counsel, gone into bankruptcy. These notes, as the plaintiff put it, were turned in from time to time on payments being made and renewals given, the last renewal being a note for \$3,580, with interest, dated the 18th December, 1929, and due on the 1st February, 1930. The alleged guaranty is in the words and figures following:—

“Dear Sir: Re Rusholme-drive job. Confirming our telephone conversation of yesterday, I beg to state that I shall personally see to it that you get your payments regularly as per contract.

“Trusting that this is entirely to your satisfaction,

“Yours very truly,

“City Builders Ltd.,

“per Charles Zuckerman.”

It is admitted that the written name "Charles Zuckerman" is in the defendant's writing; that there was consideration for the alleged guaranty; and that it was sufficient in form. But two objections were taken by counsel for the defendant: one, that the document, being signed "City Builders Limited, per," in type-writing, and "Charles Zuckerman" in the handwriting of the defendant, did not constitute a personal guaranty, but was a guaranty by the company of its own account; and, secondly, that, if it is construed as a personal guaranty of the defendant, the plaintiff, by accepting notes and renewals, discharged the surety by an indulgence in the giving of time.

With regard to the first objection, I am of opinion that the signature is sufficient to charge the defendant personally, and not City Builders Ltd. The document is couched in language which admits of no other construction. If it were to be considered as a guaranty by the company of the company's own debt, the guaranty would be meaningless and would add nothing to the plaintiff's security for his debt, because the company was already liable under its contract to pay the plaintiff's account, and the construction most favourable to the validity of the instrument should be adopted. The reasoning in *Elliott v. Bax-Ironside*, [1925] 2 K.B. 301, although that case turned on the Bills of Exchange Act (English), is equally applicable in the case at bar. Moreover, where the language of the writing is that of the guarantor himself, it will be construed rather in favour of the other party because it was the duty of the guarantor in framing it to be careful so to frame it as not to mislead the person to whom it was addressed: *St. Lawrence Steel and Wire Co. v. Leys* (1903-4), 6 O.L.R. 235, 7 O.L.R. 72.

I admitted extrinsic evidence of the surrounding circumstances and of the intention of the defendant, and from that evidence it clearly appears that the defendant intended to give and thought he had given his personal guaranty to the plaintiff, as consideration for the plaintiff refraining from notifying the mortgagees of the order which the company had given to him. I have found no case apart from the cases under the Bills of Exchange Act exactly similar; but it is clear that a signature may be defined as the writing of a person's name on a document in order to authenticate and give effect to some contract therein: Chalmers on Bills of Exchange, 9th ed., p. 329; and Benjamin on Sale, 6th ed., p. 305.

The rule is that "any material alteration in the terms of a guaranteed contract made by the principals without the guarantor's consent will discharge him and that a binding agreement for extension of time without reservation of rights will always be deemed such a variation because it disables a guarantor, should

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Logie, J. he be minded to discharge the principal debtor's obligation and
1930. seek repayment from him or to compel him to do so himself, from
immediately proceeding against him:" *North Western National
Bank of Portland v. Ferguson* (1918), 57 Can. S.C.R. 420, at p.
MILES v. 429; the guarantor's assent to an extension need be neither con-
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original contract assuming liability; it may be involved in the
arrangement or understanding between the principals which he
has undertaken to guarantee. It must always be a question of the
intention of the parties (either expressed, or, if not expressed, to
be inferred from the terms in which they have couched their agree-
ment, construed, if they are "at all ambiguous," in the light of
their relative positions and of the surrounding circumstances) whether
an extension without reservation of rights, relied upon as
having worked the discharge of the guarantor, was or was not
within the purview of the guaranty: C.E.D. (Ont.) vol. 5, p. 445.

The general rule that a surety who has concurred in or ratified
an arrangement between the creditor and the principal debtor can-
not claim to be discharged by the effect of that arrangement is
not disputed: *Ex p. Harvey* (1854), 4 DeG. M. & G. 881, 899.
The assent of the defendant to the extension of time by the notes
given from time to time in this case cannot be denied. He per-
sonally arranged for each of the notes to be taken, and personally
made from time to time the payments shewn in exhibit 5, and he
is now debarred, I think, from saying that in his capacity as presi-
dent of the company he obtained an extension, but in his per-
sonal capacity he was released because of that extension. The
facts of this case are much stronger than the facts in *Clark v.
Devlin* (1803), 3 B. & P. 363; or *Tyson v. Cox* (1823), Turn. &
Russ. 395.

It is sufficient, out of the cases mentioned in Rowlatt on Prin-
cipal and Surety, 2nd ed., p. 270, to cite *Clark v. Devlin*. The
holder of a bill of exchange of which payment had been refused
informed the drawer of his intention to take security from the
acceptor, and the drawer answered, "You may do as you like for
I have had no notice of non-payment," and that he, the drawer, was
discharged for want of notice. It appeared that due notice had
been given, and it was held that the holder might sue the drawer
notwithstanding that he had taken security from the acceptor, for
the drawer under such circumstances must be considered as
having assented to the security being taken.

This, as I have said, is a much weaker case than the case at
bar, and I hold accordingly that the defendant, in negotiating the
extensions of time on behalf of the company, assented to each
renewal at the time it was given in his capacity as surety.

There will be judgment therefore for the plaintiff for \$3,580, with interest at 6 per cent. until the 1st February, 1930, and thereafter at 5 per cent. to date.

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[APPELLATE DIVISION.]

COMMERCIAL MOTOR BODIES AND CARRIAGES LTD. v. PERTH LTD.

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Oct. 2.

Sale of Goods—Bulk Sales Act, R.S.O. 1927, ch. 167, secs. 1(a), 3, 6, 8—Action to Set aside Sale—Whether Brought in Time—Notice to Plaintiff—Knowledge of Solicitor.

The judgment of ORDE, J.A. (1930), 65 O.L.R. 383, affirmed.

AN appeal by the plaintiff company from the judgment of ORDE, J.A. (1930), 65 O.L.R. 383, dismissing the action.

October 1 and 2. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, JJ.A.

W. R. Smyth, K.C., for the appellant company.

D. L. McCarthy, K.C., for the defendant company, respondent, was not called upon.

October 2. MULOCK, C.J.O. (delivering the judgment of the Court at the close of the argument for the appellant company):—It is admitted that the plaintiff company cannot succeed unless it can shew that its action was brought within the time limited by the statute. Mr. Boland, the plaintiff company's solicitor, had notice of the transaction complained of, as the result of his conversation with Mr. Keen, for on the day of that conversation he (Mr. Boland) wrote to the defendant company complaining of the transaction and stating that he was instructed by the plaintiff company to bring an action attacking it.

We agree with the finding of the learned trial Judge respecting this question, and it is therefore unnecessary to enter into the discussion of any other question.

Appeal dismissed with costs.

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TOWNSHIP OF WEST FLAMBOROUGH V. PRETUSKI.

Oct. 10.

Water—Flooding of Farm-lands—Surface-water—Culvert Constructed by Municipality—Obstruction by Landowners of Water Flowing through — Enlargement of Capacity—Easement—Extent of—Prescription—Lost Grant—Limitations Act, sec. 34—Action to Compel Removal of Obstruction.

Running through the farm of the defendants, situate to the east of one of the highways of the plaintiff township corporation, was a natural depression, on and over which the surface-water from the lands higher up ran to a stream lying still lower. Fifty years ago, or earlier, there was a culvert under the highway, carrying the water from the west to the east of the road, this water being the surface-water of some of the lands west of the road, and a smaller proportion coming from the road itself. The original stone-walled, plank-covered culvert was, some time ago, replaced by a concrete pipe conduit of 18-inch diameter, and that more recently by a 20-inch iron tube, thereby increasing the capacity. In 1928, the defendants, finding their crops endangered, placed some loose stones upon their own land, which, in some degree, checked the flow of the water, and to that extent was injurious to the road. The defendants refusing to remove the obstruction, the township corporation brought this action, claiming "a watercourse through the lands of the defendants from the highway" and an easement by lapse of time or "lost grant." The trial Judge found as a fact that there was no well-defined watercourse but simply a depression which was scraped out or deepened to accommodate the flow of water, but never to such a degree as to form well-defined banks or a watercourse, and never to the extent of interfering with crops growing on the land; and he dismissed the action:—

Held, by the majority of the Court, upon appeal, that the plaintiff corporation had obtained by prescription, under the Limitations Act, now R.S.O. 1927, ch. 106, sec. 34, or by way of lost grant, an easement to cast upon the lands of the defendants surface-waters to the same extent as at a date 20 years before the commencement of the action, but that it had no right to increase the volume and force of the current beyond that which existed 20 years ago; to the extent to which the volume and force of the current at times of flood was now greater than it was 20 years ago, the plaintiff corporation was a trespasser.

Held, therefore, by the majority, that there should be a declaration of the plaintiff corporation's right to an easement entitling it to cast upon the lands of the defendants surface-waters in the same manner and to the same extent as on the 28th June, 1909, and, subject to that declaration, that the appeal should be dismissed with costs.

Per LATCHFORD, C.J., and RIDDELL, J.A.:—The plaintiff corporation was not entitled to an easement; and the defendants had merely checked the excess over the former amount of water brought upon their land, and in doing so had done no more than was necessary for that purpose.

AN appeal by the plaintiff corporation from the judgment of the County Court of the County of Wentworth (EVANS, Co. C.J.), dismissing with costs an action for a mandatory order requiring the defendants to remove certain obstructions to the flow of water

through a culvert constructed by the plaintiff corporation for the purpose of draining surface-water from a roadway.

June 17. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

D. L. McCarthy, K.C., and *H. A. F. Boyde*, for the appellant corporation, argued that it had a legal right to discharge water on the lands of the defendants. It had an easement so to do for more than 20 years. A legal origin in the form of a lost grant for the use of the culvert should be presumed for this right. Sections 33, 34, and 35 of the Limitations Act, R.S.O. 1927, ch. 106, were relied upon. The appellant corporation had not lost its easement by enlarging the culvert. The evidence did not shew any increased flow of water. An injunction should be granted against the maintenance of the obstruction, and there should be a reference as to damages. Counsel referred to Goddard's Law of Easements, 8th ed., p. 321; *Oliver v. Lockie* (1894), 26 O.R. 28, and at p. 34; *Attorney-General v. Copeland*, [1901] 2 K.B. 101, [1902] 1 K.B. 690; *Treguno v. Township of Barton* (1921), 20 O.W.N. 2.

A. L. Shaver, for the defendants, respondents, relied upon the findings below as to the increased flow. If any easement had been acquired, it was only for the flow of water through the smaller pipe, but counsel did not admit that an easement had been proved. Reference to *Cotton v. Pocasset Manufacturing Co.* (1847), 54 Mass. 429; Angell on Watercourses, 7th ed., p. 119.

McCarthy, K.C., in reply, referred to *Abell v. Village of Woodbridge and County of York* (1917-19), 39 O.L.R. 382, 45 O.L.R. 79; *S.C., sub nom. Abell v. Corporation of the County of York* (1920), 61 Can. S.C.R. 345.

October 10. LATCHFORD, C.J.:—This appeal is against a dismissal of the plaintiff's action on the 21st January, 1930, by his Honour Judge Evans, of the County Court of the County of Wentworth.

The plaintiff claimed a right by prescription to discharge surface-water on the lands of the defendants. It had so discharged water for many years from a culvert under and across a municipal highway. The culvert had been twice improved, once more than 20 years ago, and again in recent years, when the road was put in better repair and the ditches on both its sides were cleaned out by a grader and widened. It is not clear that the recent any more than the first enlargement of the culvert itself increased the flow of water; but it is beyond question that since the road was repaired and the new culvert installed there has been such a discharge over a field of the defendants adjoining the highway that, while a

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simple furrow sufficed previously to carry off the water discharged from the culvert and the highway, the flow was latterly so great that, upon the evidence of a witness for the plaintiff—its road-superintendent in fact—a ditch now exists “4 to 6 feet wide . . . right across his” (the male defendant’s) “field as far as you can see.” This is in the depression where no watercourse previously existed and a furrow sufficed to care for all the water flowing from the culvert and the road.

I agree with the conclusion of Mr. McCarthy that the enlarged ditches along the east side of the road could not increase the flow through the culvert—the fall being from west to east; but what they and the similarly improved ditches on the west side of the road undoubtedly did was to increase notably the discharge over the defendants’ lands in excess of what the plaintiff had any prescriptive right to do. The defendants then had reason to protect themselves against the excess damage which the improvement of the highway occasioned to the property, and I think they have done no more.

I would dismiss the appeal with costs.

RIDDELL, J.A.:—The defendants are the owners of a farm to the east of one of the highways of the plaintiff township; their land has running through it a natural depression, on and over which, from the beginning of our present geological period, the surface-water from the lands higher up has run to a stream lying still lower. This is the situation of millions of acres in the Province; and has nothing peculiar about it.

As early as some 50 years ago, if not earlier, there was a culvert under the highway spoken of, carrying the water from the west to the east of the road, this water being the surface-water of some of the lands west of the road, with a smaller proportion coming from the road itself, in times of rain or snow-melting. The original stone-walled, plank-covered culvert was some time ago—the precise time not being material—replaced by a concrete pipe conduit of 18-inch diameter, and that more recently by a 20-inch corrugated iron tube, thereby increasing the capacity about 25 per cent. Neither of these changes, I consider of any consequence; there is, indeed, increased capacity, but I find no evidence to justify the conclusion that the original stone-walled culvert would not carry all the water that now flows; and, of course, it is not the capacity to carry water, but the amount of water actually carried, that is of importance in the present inquiry.

In 1928, the defendants, finding their crops endangered, and depending upon their crops for a livelihood, placed some loose stones upon their own land, which, in some degree, checked the

flow of the water, and to that extent was injurious to the road.

The defendants refusing to remove the obstruction, the township corporation brought this action, claiming "a watercourse through the lands of the defendants from the highway;" the claim is also made of a lost grant of an easement. Of this last, there is not and was not intended to be any evidence; it is but the old form of pleading looking to an easement by lapse of time; and we need pay no attention to it.

The learned Judge of the County Court of the County of Wentworth, who tried the case without a jury, found as a fact that there was no "well-defined watercourse but simply a depression which was scraped out or deepened to accommodate the flow of water and never to such a degree as to form well-defined banks or a watercourse and never to the extent of interfering with crop growing on the land"

This finding is in full accord with the evidence; much evidence was given of the natural flow of the water; but this was always of surface-water from rain and snow, never water of a stream farther up. The first instance of anything but the natural, grass-grown surface of the earth on land, was the owner, Enright, running a furrow down the depression, easterly from the culvert, about 1903 or 1904. While not a particle of water came through the culvert upon his land at any time but the times of the spring and fall freshets, when it did come, "it used to seep through," and Enright, after he had seeded the field with oats, took a plough and ploughed a furrow down through the field—this was obviously to draw away the seeping water, and dry the land. But there was no pretence of having or of making a regular watercourse. Enright, next year, seeded the land with clover and timothy and "cut hay right over that bumpy furrow with the mowing machine." Nor do we find anything like a watercourse at any time. The Reeve himself says that "there's a natural depression there in the ground," but "no indication of any" defined "banks or bed;" and there is no difference between "this depression and any other."

This being the state of affairs, the plaintiff cannot claim, as a riparian proprietor, that the water of the stream as to which it is a riparian proprietor has been checked.

That there is no right, *jure natura*, to drainage of mere surface-water is perfectly established by such cases as *Crewson v. Grand Trunk Railway Co.* (1867), 27 U.C.R. 68; *McGillivray v. Millin* (1867), 27 U.C.R. 62; *Ostrom v. Sills* (1897). 24 A.R. 526; and similar cases.

The only way in which the plaintiff claims now is under the Statute of Limitations, R.S.O. 1927, ch. 106, sec. 34.

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It would appear that the stones were put in in the summer of 1928, that the road-superintendent of the plaintiff knew of the obstruction; but the action was not brought till June, 1929; apparently the defendants do not derive any benefit from sec. 35—at all events, nothing was said of this to us; and I pass it over.

But it is plain that there has been a material change in the amount of water cast upon the defendants' land, perhaps not so much in the amount sent annually upon it as in the time and manner of doing so, making, in any case, a substantial change in the use of this land.

It has long been recognised as law that the right to an unobstructed access of light and air, through (say) a window, is lost by a material alteration in the window: *Blanchard v. Bridges* (1835), 4 A. & E. 176; *Heath v. Bucknall* (1869), L.R. 8 Eq. 1; and the servient owner is justified in obstructing even the ancient window, if this is unavoidable in obstructing the new: *Binckes v. Pash* (1861), 11 C.B. (N.S.) 324; and the original easement is lost, at all events until the dominant owner reinstates the original condition: *Renshaw v. Bean* (1852), 18 Q.B. 112.

The same rules apply to an easement of flow of water; and the plaintiff is not helped at all by the furrows ploughed from time to time by the occupant; a right to a flow of water along an artificial cut across the soil of another, cannot be acquired through the statute, unless the circumstances under which the cut was made shew that it was intended to be of a permanent character: *Gaved v. Martyn* (1865), 19 C.B. (N.S.) 732.

I think that, in any event, the defendants have the right to check the flow of the water as they have done, even if there was a prescriptive right in the plaintiff—which I do not think there was—for the reason that they had the right to check the excess over the former amount, and, in doing so, did no more than was necessary for that purpose (so far as any evidence goes); and, moreover, the plaintiff cannot complain or have any relief unless and until the original state of affairs is reinstated—this, it may be, the plaintiff will find impracticable.

I would dismiss the appeal with costs.

Our own cases as to water-easements are in accord with the above: *Williams v. Richards* (1893), 23 O.R. 651; *McGillivray v. Millin*, 27 U.C.R. 62; *Crewson v. Grand Trunk Railway Co.*, 27 U.C.R. 68; *Darby v. Township of Crowland* (1876), 38 U.C.R. 338; *Re Sinclair v. Sharpe* (1924), 26 O.W.N. 134; *Abell v. Village of Woodbridge and County of York*, 39 O.L.R. 382; and other cases.

MASTEN, J.A.:—This is an appeal by the plaintiff from a judgment pronounced by his Honour Judge Evans, Judge of the County Court of the County of Wentworth, on the 21st January, 1930, whereby he dismissed the plaintiff's action with costs.

The plaintiff is a municipal corporation, and as such is the owner and occupier of a highway situate in the township of West Flamborough and running in a northerly and southerly direction. The defendants are the owners of certain farm-lands lying to the east of the plaintiff's highway.

On the west side of the highway, other farm lands are situate, and the slope of the whole countryside is from west to east. The surface-water from the farm-lands on the west side of the highway flows down to the highway, and by means of a culvert under the highway that water—as also the surface-water which flows on certain parts of the highway itself—continues in an easterly direction and is thrown on the lands of the defendants.

The defendants have erected a barrier on their premises to prevent the water from coming on their lands, and the plaintiff brings this action to compel the removal of the barrier.

The physical features of the watershed from which the waters in question arise, including the general slope of the terrain from west to east, are clearly described in the judgments of my Lord and my brother Riddell and the description need not be repeated.

The evidence makes it clear that the water in question is surface-water only, collected by ditches on the farms to the west of the highway which passes from these farms to the ditch on the west side of the highway. The surface-water from these west side farms, together with the surface-water from the west side of the highway, is there for the first time gathered together and passes under the highway by means of the plaintiff's culvert. Having thus passed under the *via trita* of the highway, it is augmented by so much of the surface-water as falls on the east half of the highway, and then it all passes from the highway to the lands now owned by the defendants. Over these it originally seeped in no defined channel down towards the stream known as Spencer's Creek.

In the year 1903 the lands of the defendants were owned and cultivated by one Enright, who testifies that in that year, after sowing the field in question in oats, he ploughed a single furrow to assist the passage of the water.

Subsequently, in the year 1907, one Baker, then the owner and occupier of these lands, enlarged this single furrow to a broad shallow ditch. His evidence appears at p. 34 of the record as follows:—

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"Q. After you went on the farm, what did you find as to whether or not any water was coming from this culvert across the road that is referred to? A. In this particular instance, of course, that field that's in trouble now was sod. I pastured it the first summer, and then in the fall that furrow that Mr. Enright spoke of wasn't satisfactory as a drain, so I went at it with a team and ploughed it, and made a proper ditch, I suppose it would be may be 18 inches deep at the bottom and sloped out so you could drive across it or harrow across it.

"His Honour—You just made a depression? A. So the water would naturally flow into one place and carry it away.

"Mr. Boyde—Where had the water been flowing before you did this? A. It just kind of flowed all over it, it made the whole thing wet, it was 'only just this little furrow, and it wasn't big enough to carry the water off, and it seeped all over the land.

"His Honour—What you did was to take and confine it to one channel? A. Yes.

"Mr. Boyde—And it has been so confined ever since? A. Yes, all the time I was there, but I noticed passing there it gradually filled up, it wasn't in as good a shape as I fixed it.

"His Honour—Grass and silt and all that kind of thing? A. Yes, and those ditches will naturally fill up if you don't keep them clean.

"Mr. Boyde—Was that what happened before you made it, filled with silt and grass? A. Yes, that's just the shape it was when I went there.

"Q. Could you see where the water flowed? A. Certainly, it was low through there, but you could see if there wasn't a depression made deep enough to carry the water it would flow all over the top of the ground."

No doubt the defendant found it less laborious to obstruct the entrance of the water by boulders and stones (which he placed on his own lands where the water entered) rather than to clean out the broad, shallow ditch which Baker had constructed.

The present contest is in truth exceedingly trivial, but it appears to me to raise questions of very wide general importance. There must be on the highways of Ontario, hundreds, perhaps thousands, of places where the situation is practically identical with that here in question.

This fact seems to me to suggest the propriety of an endeavour on the part of this Court to clarify the situation and to define as clearly as may be the respective rights of the parties as a guide and assistance to other persons similarly situated.

Certain findings of fact and of law regarding matters that are

unquestionable, will narrow the limits of the present discussion.

First: Riparian rights in a natural watercourse are not here in question. This appeal relates, as I have said, to surface-water passing over the defendants' land in no defined channel.

Second: Under the law of Ontario, a right of drainage does not exist *jure naturæ* for the flow of mere surface-water spreading over land lying on a lower level: *McGillivray v. Millin*, 27 U.C.R. 62; *Crewson v. Grand Trunk Railway Co.*, 27 U.C.R. 68, at p. 71; *Ostrom v. Sills*, 24 A.R. 526, affirmed (1898) 28 Can. S.C.R. 485.

Third: The area of the watershed from which the waters in question are derived has now been increased by artificial means—and there is no evidence to indicate that the amount of water which in the course of a year is thrown upon the defendants' lands has been increased at any time, but the evidence makes it plain that in time of flood, e.g., when the snow melts in the spring or when torrential rains occur in summer, the volume and force of the stream of water thrown upon the defendants' lands has, during the past 20 years been augmented in consequence of the clearing up of the adjoining lands, the widening of ditches, and the general improvement of the drainage conditions. This augmentation leads naturally to a more extensive spread of the flood-waters over the defendants' lands.

Fourth: Save in so far as the plaintiff may have acquired an easement permitting it to cast the waters in question on the lands of the defendants, the defendants are entitled to protect themselves from the entrance of flood-waters, by erecting on their own lands a barrier such as that here in question: *Gerrard v. Crowe*, [1921] 1 A.C. 395. In that case the authorities are reviewed by Viscount Cave and the law is laid down that where in times of flood the waters do not flow in a defined channel, but simply spread over the country, it is lawful for the owner to build an obstruction on his own lands to prevent damage thereto by the flood-waters, though thereby damage should happen to his neighbour.

Fifth: Assuming for the moment that the plaintiff has acquired an easement permitting it to cast on the lands of the defendants waters in such volume and with such flow as existed 20 years ago, it remains clear that the defendants are entitled to erect on their own lands an obstacle to shut out any flood-water in excess of that which the plaintiff was entitled to pass or send forward by virtue of his easement.

Sixth: Not only so, but the claim of the plaintiff is for a mandatory injunction to compel the defendants to remove the obstruction and for an injunction restraining them from hereafter

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replacing it. But an injunction is an equitable remedy, and, as the plaintiff is trespassing by wrongfully casting on the lands of the defendants flood-waters in excess of his legal rights—it comes within the scope of the maxims: “He who seeks equity must do equity,” and “He who comes into equity must come with clean hands.” In other words, it cannot have its injunction while wrongfully infringing the defendants’ rights

This may, perhaps, form a sufficient ground for dismissing the plaintiff’s appeal *simpliciter*; but, for the reasons mentioned above, I have thought it desirable that I should express my opinion regarding the easement claimed by the plaintiff and indicate my view of the legal rights of the parties respectively.

The evidence for the plaintiff shews that the practice in question has continued without interruption and has been submitted to and acquiesced in by the several owners of the defendants’ lands for more than 50 years, and the plaintiff claims that thereby it has obtained by prescription under the statute, or in the alternative by way of lost grant, an easement to cast such waters upon the lands of the defendants.

That such a right may be acquired is well-settled law. In Goddard on Easements, 8th ed., p. 321, the law is thus stated:—

“A right may also be acquired by grant or by prescription to pour water or to cause water to flow over the land of another person; for if a stream is artificially brought to the surface of land and the water is then made to flow over the land of another person without his consent a trespass is committed for which the party causing the water to flow is responsible; but if the practice of so pouring the water over the land has continued uninterruptedly for 20 years such user would cause a presumption of grant to arise and a right to continue the pouring of water may be acquired.”

In *Chamber Colliery Co. v. Hopwood* (1886), 32 Ch. D. 549, 558, it was said by Bowen, L.J., that the mere discharge of water by A., an upper proprietor, may easily establish a right on the part of A. to go on discharging, because so long as the discharge continues there is submission on the part of B. to proceedings which indicate a claim of right on the part of A. This principle was applied in the case of *Attorney-General v. Copeland*, [1902] 1 K.B. 690. The facts of that case are so similar to those of the present case that I take the liberty of quoting it somewhat fully. The head-note is as follows:—

“The highway authority of a rural district had, for a time beyond living memory, maintained a pipe running through a bank which divided the highway from the defendant’s land adjoining, and had discharged, through the pipe and on to the defend-

ant's land, water which collected on the highway. There was no defined channel on the defendant's land into which the water so discharged could flow. The defendant having stopped up the pipe, an injunction was claimed to restrain him from continuing the obstruction. On appeal from the refusal of the injunction:—

“Held, that the fact that the pipe was not connected with a defined channel into which the water conveyed by it could flow did not prevent its being a drain within the meaning of sec. 67 of the Highway Act, 1835; and that, in view of the length of time during which the drain had been used, a legal origin ought to be presumed for the right claimed of passing water through the drain on to the defendant's land.”

The facts were that the road at the point where it adjoins the defendant's land has a rising gradient in each direction, and the rain and storm water falling on the road naturally flowed down from each direction to the point opposite the defendant's land and there fell into two catch-pits, one on each side of the road. These two catch-pits were connected by means of a pipe under the road, and the whole of the water ultimately found its way into the catch-pit next the defendant's land, which was at a lower level than the other. There was a pipe through the bank which separated the defendant's land from the highway, and by means of this pipe the overflow from the catch-pit was discharged on to the defendant's land, from which point the water flowed away over the surface of the land, and not in any defined channel. The evidence shewed that in 1868 the then existing catch-pits were repaired, and the pipes under the road and through the bank were replaced by those which were in position at the date of the trial. The defendant had blocked up the end of the pipe so as to prevent the continuance of the flow of the water over his land, and the plaintiff claimed an injunction to restrain the defendant from maintaining the obstruction.

In the course of his judgment, Collins, M.R., says (p. 693): “Where there has been well-established user, as in this case” (1868 to 1900), “extending over a long series of years, it is the duty of the Court, if possible, to find a legal origin to explain the existing facts.” After describing the situation, he continues: “That mode of removing the water from the road, or some method for which it was substituted, has been in existence, as I have already said, for many years. It is compatible with certain evidence that was given in the case that there had at one time been a ditch on the defendant's land which carried away the water from the point at which it entered the land. Upon this state of facts it seems to me that this convenience for carrying away the water was a drain

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App. Div. within the meaning of the section; and, moreover, that a legal
1930. origin was possible and ought to be presumed for the right which
is claimed by the local authority to use this drain to carry away
the water from the road.”

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The decision of Lord Alverstone in the Court below was
reversed and the injunction was granted.

PRETUSKI. This case was followed and applied by the King's Bench Divi-
sion in Ireland in the case of *King's County Co. Council v. Ken-
nedy*, [1910] 2 I.R. 544, the head-note of which reads as follows:
Masten. J.A. “The defendant was the occupier of lands adjoining a highway,
and separated therefrom by a bank 3 feet in width. A drain, or
eye, which had been in existence for 29 years, and by means of
which surface-water from the highway was discharged on to the
defendant's lands, passed through the bank. There was no evi-
dence as to the origin of the drain, nor was there any defined
channel on the defendant's lands into which the water so dis-
charged could flow, nor any evidence that there had ever been
such a channel. The defendant was prosecuted under 14 & 15
Vict. ch. 92, sec. 9, for neglecting to scour the drain in question
when required to do so by the road authority:—

“*Held*, that the Court ought to presume a legal origin for the
drain, and that the defendant was therefore bound to scour it.”

Other cases to a similar effect are cited and discussed in the
case of *Abell v. Village of Woodbridge and County of York*, 39
O.L.R. 382, at pp. 389 to 391, affirmed in the Supreme Court of
Canada, 61 Can. S.C.R. 345.

The case of *Cotton v. Pocasset Manufacturing Co.*, 54 Mass.
429—much relied on by the respondents—is readily distinguish-
able on its facts. The plaintiff's action was in trespass on the case
for an interference with the drain from his cellar whereby water
was backed up on to his premises. Before any prescriptive right
had been acquired by the plaintiffs, the old drain had been aban-
doned and a new drain—not only larger and deeper than the
former but *also located in a different place*—had been substituted
by the plaintiff, or by those through whom he claimed, for the
original drain. It was held that this interrupted the acquisition
of the prescriptive right.

In the present case, the evidence shews that more than 50 years
ago. that is prior to 1880, the water which came to the highway
from the farms on its west side was carried across and under the
highway by a box-drain with stone sides and a plank top and then
passed on to the lands now owned by the defendants. I cannot
find that the dimensions of this drain are stated in the evidence,
though we were told in argument that it was 24 inches wide and

probably of the same depth. This original drain continued in use from before 1880 until 1908, when, the planks having worn out, it was replaced in the same location by a cement tile drain 18 inches in diameter. This tile drain continued in operation from 1908 until 1929, when it was replaced by a corrugated iron pipe 20 inches in diameter. During the whole time from 1880 until some time in 1928 the township corporation cast on the lands now owned by the defendant all the surface-water which naturally came to the place in question, not only from the farms on the west side, but also from the highway itself. This action was not only continuous but was constant in its mode and in its location.

The condition, therefore, which now exists has substantially continued for more than 48 years without complaint or interruption by any of the owners of the defendants' lands, and the first interruption which occurred happened in the year 1928, when the defendants created on their own lands a blockade of boulders and stones. The date in 1928 when this was done does not clearly appear from the evidence. One of the defendants was placed in the witness-box on his own behalf but says nothing about the date when he created the blockade complained of. The plaintiff as part of its case read from the examination for discovery of this defendant as follows:—

“Q. 91. When did you put these stones down? Was it this spring or last spring? A. Last summer.

“Q. 92. Do you mean the summer of this year or the year before this? A. A year ago; a year ago this summer.

“Q. 93. A year ago from this summer past? A. Yes.

“Q. 94. That would be about 14 or 15 months ago? A. For me to start to plough for potatoes.”

The trial took place on the 17th January, 1930; 15 months before that would be the 17th October, 1928, which is about the time of digging potatoes. The letter of the plaintiff requiring the defendants to remove the obstruction is dated the 2nd April, 1928, and the writ was issued on the 28th June, 1928. It thus appears that the interruption of the plaintiff's easement was not submitted to or acquiesced in for one year after the plaintiff had notice of the interruption, and so, in my opinion, the plaintiff is entitled to prescribe under the statute R.S.O. 1927, ch. 207, secs. 34 and 35. But, even if the statute does not apply, the evidence clearly establishes an easement by way of lost grant, having regard to the cases to which I have already referred.

The evidence of Brock Green at p. 45, line 20, is as follows:—

“Can you tell us how long within your own personal memory that culvert has been there? A. It has been there over 50 years.

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"Can you recall any particular incident in the neighbourhood of 50 years ago when you noticed that culvert? A. Yes, I was sent on an errand 49 years ago and went over it

"Forty-nine years ago? A. Yes.

"And you passed over that particular culvert? A. Yes.

"Has the water always flowed through that culvert on to the land now owned by Mr. Pretuski? A. Yes, always has."

For these reasons I am of opinion that the plaintiff has acquired and now possesses an easement entitling it to cast upon the lands of the defendants surface-waters to the same extent and in the same manner as existed at a date 20 years prior to the issue of the writ, but that it has no right to increase the volume and force of the current beyond that which existed 20 years ago. It is established by the evidence that the volume and force of the current at times of flood is now greater than it was 20 years ago, and therefore to that extent the plaintiff is in the wrong as a trespasser.

The practical solution of the difficulties here existing may perhaps be the expropriation by the municipal authority of an easement to pass this water over the lands of the defendants as it now flows, but in ascertaining the compensation to which the defendants might be entitled in such an arbitration, the fact that the municipal authority is already legally entitled to a substantial easement such as, in my opinion, exists in the present case, would tend greatly to minimise the damages to which the owner of the servient lands would be entitled. For this reason I have thought it important that the views which I entertain in this regard should be somewhat fully expressed.

Instead, therefore, of a bare dismissal of the appeal, I would declare that the plaintiff is entitled to an easement entitling it to cast upon the lands of the defendants surface-waters in the same manner and to the same extent as existed on the 28th June, 1909, and, subject to such declaration, that the appeal be dismissed with costs.

ORDE and FISHER, J.J.A., agreed with MASTEN, J.A.

Judgment as stated by MASTEN, J.A.

[APPELLATE DIVISION.]

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Negligence—Motor-vehicles upon Highway—Injury to and Death of Bicyclist in Collision with Motor-car—Bicyclist Thrown against Motor-truck Parked in Highway—Alleged Negligence in Parking—Right to Park Temporarily while Driver in Shop on Business—Reasonable Conduct—Operating Cause of Accident—Evidence.

The driver of a vehicle has a right to stop temporarily upon a highway to load or unload his vehicle, but this right is limited by the correlative right of others to pass along the highway. The right of the driver so to stop must be exercised reasonably; and whether the length of time or extent of stoppage is reasonable is a question of fact to be determined by the circumstances of each case.

In a busy city street, 45 feet wide, angle-parking was allowed on the west side and parallel-parking on the east side. R., the owner of a delivery-truck, had occasion to drive it upon this street to receive some parcels from a shop abutting on the street. He found both sides of the street covered with parked vehicles. He stopped his vehicle close to the line of angle-parked vehicles on the west and 24 to 26 feet from the line of vehicles on the east. He then entered the shop; and, in his temporary absence, B. came along on his bicycle, going north close to the west line of parked vehicles, and had got to a point a little north of the standing truck, when a motor-car, owned by C. and driven by his daughter, came south; the driver turned out to the east to pass the truck, but, seeing traffic approaching from the south, instead of stopping, turned west, and struck B., throwing him against the truck and under it and killing him instantly. That the C. car was negligently driven was not denied.

In an action brought by the widow and children of B. against C. and his daughter and R., it was *held*, that R. (having been absent only two or three minutes when the accident happened) had exercised his legal right to stop in a reasonable way; and, if sec. 42 (1) of the Highway Traffic Act applied, had proved his non-culpability.

Held, also, that, admitting the alleged negligence of R. to have been *causa sine qua non*, it was not *causa causans*—the sole operating cause was the negligent act of the driver of the motor-car.

Review of the authorities as to the right of one with a vehicle upon a highway to stop temporarily for the legitimate purposes of his business.

AN appeal by the defendant Charles Reeves and a cross-appeal by the plaintiffs from the judgment of LOGIE, J., at the trial of the action without a jury, in favour of the plaintiffs for the recovery of \$5,000 damages, \$3,000 for the plaintiff Elizabeth Brain and \$2,000 for the infant plaintiffs.

The husband of the plaintiff Elizabeth was riding a bicycle upon a highway in the city of Sarnia when he was run into by the motor-vehicle of the defendant C. Crinnian, driven by the defendant Janice Crinnian, and thrown against a truck owned by the appellant, which, the plaintiffs alleged, had been negligently parked upon the highway. Brain sustained injuries which resulted in his death, and this action was brought by his widow and

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children, under the Fatal Accidents Act, against Reeves and the Crinnians. The appellant denied his responsibility for the injuries and death; and the cross-appellants sought additional damages, but from Reeves only.

September 22. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

J. A. Barron, K.C., for Charles Reeves, the appellant, contended that he had done nothing illegal, nor was he even negligent in stopping his delivery truck behind the angle-parked cars, on Christina-street, and that the trial Judge erred in holding otherwise. The statute, much less the police by-laws, did not abrogate the common law: *Roberts v. Charing Cross Euston and Hampstead Railway Co.* (1903), 87 L.T.R. 732; *Carter v. Vadeboncœur* (1922), 66 D.L.R. 118, at p. 120. The appellant was not guilty of any obstruction of the highway: see *Gill v. Carson and Nield*, [1917] 2 K.B. 674; nor was what he did, *ipso facto*, a wrongful act: *Sullivan v. McWilliam* (1893), 20 A.R. 627; *Ryan v. McIntosh* (1909), 20 O.L.R. 31. [The Court here stopped counsel for the appellant.]

G. M. Jarvis, for the plaintiffs, respondents and cross-appellants. Having regard to all the circumstances and the state of the traffic, it was negligent on the part of the driver to stop his truck and leave it unattended as he did. It had ceased to be a legal right by reason of the city by-law then in force prohibiting the stopping of vehicles otherwise than as indicated in the by-law. The parked truck created the emergency in which the co-defendant blundered: *Empey v. Thurston* (1925), 58 O.L.R. 168. The onus is on the appellant to shew that the accident did not occur because of his negligence or improper conduct: The Highway Traffic Act, R.S.O. 1927, ch. 251, sec. 42. There is no question but that the driver of the truck was guilty of improper conduct in committing a breach of the city by-law passed to prevent just such an exigency. The respondents are relieved from inquiry as to whether the negligence is remote or direct, so long as there is a direct chain of causation. Reference to Halsbury's Laws of England, vol. 21, para. 649; *Sullivan v. Creed*, [1904] 2 I.R. 317, at pp. 342 and 356; *Crane v. South Suburban Gas Co.*, [1916] 1 K.B. 33; *Harding v. Edwards and Tatisich* (1929), 64 O.L.R. 98; *Bissell v. Township of Rochester* (1930), 65 O.L.R. 310, at p. 312; *Dority v. Ottawa Roman Catholic Separate Schools Trustees* (1930), 65 O.L.R. 360. The damages found were inadequate.

Barron, K.C., in reply said that the respondents' counsel proceeded on the assumption that there was negligence in the appellant. If there was not, his argument failed. On the question of

the appellant failing to satisfy the statutory onus, the trial Judge erred in his finding. The onus can be satisfied in two ways: (1) by shewing no negligence; (2) by shewing how the accident happened. In both ways the appellant had complied with these requirements.

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October 10. RIDDELL, J.A.:—The plaintiffs, the widow and infant children of the deceased George Henry Brain, sue the Crinnians, father and daughter, and also Reeves, for damages under "Lord Campbell's Act" for the death of Brain. The Crinnians did not enter an appearance or appear at the trial; the trial took place before Mr. Justice Logie, at Sarnia, and resulted in a judgment for the plaintiffs for \$5,000, \$3,000 for the widow and \$2,000 for the infants.

Reeves now appeals, and the plaintiffs cross-appeal for an increase in the amount of damages, serving and directing the notice against Reeves only.

Some formal difficulties raised at the trial have been got rid of and need not be considered here. The appeal of Reeves should be decided.

In Sarnia there is a street, Christina-street, some 45 feet wide and a busy street; on the west side, angle-parking is allowed, and on the east, parallel-parking. Reeves, the owner of a truck, and having a chauffeur's licence, had occasion to drive upon this street to receive some parcels for transmission and delivery. He found the west side covered with cars parked angle-wise and the east side with cars parallel; accordingly, he was forced to stop on the open street while he was in the shop on his proper business—this he did by stopping pretty close to the line of angle-parked cars on the west and some 24 to 26 feet from the line of cars on the east. He then went with all convenient and proper speed on his errand into the shop.

While Reeves was in the shop, Brain came along on his wheel, going north rather close to the west line of parked cars; he had got a little north of the standing truck when a motor-car driven by Miss Crinnian came south; apparently, the driver turned out to the east to pass the truck, but, seeing traffic approaching from the south apparently preventing her passing it, instead of stopping she turned west again, and thereby struck Brain, throwing him against the truck and under it and killing him instantly. Her car itself struck the truck with such force as to shove it forward some three feet at least. That the Crinnian car was negligently driven is clear and is not denied; the question to be decided here is as to the actionable negligence of Reeves.

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The right of one with a vehicle upon a highway to stop temporarily for the legitimate purposes of his business is quite beyond question: Pratt and Mackenzie's *Laws of Highways*, 17th ed. (1923), pp. 134 *et seq.* In *Rex v. Cross* (1812), 3 Camp. 224, Lord Ellenborough, C.J., said: "A stage-coach may set down or take up passengers in the street . . . but it must be done in a reasonable time . . ." Cf. *Robinson v. London General Omnibus Co. Ltd.* (1910), 74 J.P. 161. That the right exists to stop for a reasonable time upon a street for the purpose of loading and (or) unloading goods is clear; and whether the user is excessive is a question of fact in each case: *Attorney-General v. W. H. Smith & Son* (1910), 74 J.P. 313. The recent case of *Attorney-General v. Brighton and Hove Co-operative Supply Association*, [1900] 1 Ch. 276 (C.A.), makes this beyond controversy. In that case the defendants had a number of vans, which they kept coming and going throughout the day, stopping before their warehouse for a time sufficient to load, etc.—it was held that it would be absurd to consider the stopping of a cart opposite a grocer's for five minutes, to take up goods, a nuisance. "It is always a question of degree" (p. 282). And (p. 283) Vaughan Williams, L.J., says: "Now a highway is intended primarily for the purpose of the passage of her Majesty's subjects, but it is also for the purpose that those who pass along it shall be able to stop at the houses which abut on the highway and either take up or discharge goods or persons there. The fact that in doing this you temporarily reduce the width of the roadway does not make the act unlawful, and does not make your obstruction unlawful . . ." And the language of Lord Ellenborough in *Rex v. Jones* (1812), 3 Camp. 230. 231, is adopted: "A cart or wagon may be unloaded at a gateway; but this must be done with promptness." The conclusion is reached that the question to be answered in each case is: Was a particular user necessary or reasonable?

I would modify the terminology of my learned brother Logie and say that "a driver has a right to stop temporarily on a road to load or unload his vehicle, but this right is limited by the correlative right of others to pass along it," and complete the principle by adding that the right of the driver so to stop must be exercised reasonably, and whether the length of time or extent of stoppage is reasonable is a question of fact to be determined by the circumstances of each case.

Taking now the circumstances of this case, the defendant Reeves had occasion, in the pursuit of his legitimate business, to stop opposite the shop; he went substantially as far west as the parked cars allowed him to go, leaving enough space on the road to the east for two cars to pass each other easily; he remained away

for two or three minutes only, when the accident happened. Under the circumstances, I am wholly unable to see how it can be found that he exercised his undoubted legal right to stop to take on goods in any but a reasonable way; and think that the trial Judge should have so found. Supposing that the Highway Traffic Act, sec. 42, subsec. 1, applies, I think he has proved his non-culpability.

Assuming that, contrary to the opinion of the learned trial Judge, the violation of the municipal by-law would make conduct actionable which would not otherwise be so considered—and I am not to be taken as disagreeing with his views in the present case—the defendant did not in fact violate the by-law; as was pointed out by my brother Masten during the argument, sec. 11 does not apply, as angle-parking was authorised at the place in question; nor does sec. 10 apply to fix him with liability—he did not stop longer than was necessary to load his goods.

The above considerations are sufficient to dispose of this appeal. But there is another ground upon which the appeal should succeed—that the alleged negligence, to constitute a cause of action, must be the—or a—*causa causans* and not merely a *causa sine quâ non*, though it is no excuse for killing a man to say that he would have been killed by some one else at or about the same time and in about the same way, anyway. Even admitting that the alleged negligence was *causa sine quâ non*, I am unable to see how it can be held to be *causa causans*. In my view, the sole operating cause was the negligent act of the driver of the south-bound car.

I think that the appeal of Reeves must succeed and the action against him be dismissed with costs, here and below.

With this determination of the main appeal, it becomes unnecessary to consider the cross-appeal of the plaintiffs, there being no appeal against the other defendants, and the judgment against them standing.

LATCHFORD, C.J., agreed with RIDDELL, J.A.

MASTEN and ORDE, JJ.A., agreed that the appeal should be allowed.

FISHER, J.A.:—Appeal by the defendant Reeves and cross-appeal by the plaintiffs from the judgment of Logie, J., in a fatal accident case, tried without a jury.

The defendants the Crinnians did not appear, and the widow was awarded \$3,000 damages and the infant plaintiff \$2,000 against the defendants Reeves and the Crinnians.

To understand the issues involved in this appeal, it is necessary to state the following facts. Janice Crinnian, one of the defendants, was, at about 5 p.m. on the 31st October, 1929, driving a

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Hudson car in a northerly direction in Christina-street, in the town of Sarnia; the husband of the plaintiff Elizabeth Brain was riding upon a bicycle in a southerly direction in the same street, and the defendant Reeves, the owner of a delivery-truck, left the truck standing in Christina-street, and, upon the driver of the Hudson car attempting to pass the deceased on his bicycle, struck him, knocked him down, and forced his body up against the standing truck, and he was there found mangled and dead. Christina-street is one of the busy business streets, and from kerb to kerb is 45 feet 2 inches wide. For a considerable distance on the west side of the street there were angle-parked cars, and on the east cars were parked parallel to the street. Reeves, who carried on a delivery business, had occasion to make a call at the rear of Geddes's shop, which backs upon Christina-street, and left his truck standing for two or three minutes about two feet from the rear of an angle-parked car, until he took delivery of the parcels, and, before his return, the accident, as described, took place. The open space for traffic north and south in Christina-street, after allowing for the parked cars on either side, and the truck, and where the deceased was travelling, is estimated at from 18 to 20 feet. The day was a clear one, and there is no question but that any one could see what was before him for the distance of a whole block.

The deceased was a carpenter, earning from \$1,500 to \$2,000 per year, was 42 years old, and his widow, 36 years old, is left with three infant children, ages 2, 5, and 8.

The learned trial Judge did not specifically discuss in his reasons for judgment the conduct and acts of negligence of the driver of the Hudson car, but held that the Crinnians were independent tort-feasors and that they, with Reeves, were negligent, but Reeves' negligence was the *causa causans*, because, as he found, "if the truck had not been standing there, the injury to and the death of the deceased would not have occurred."

The first question of importance is, was the accident due solely to the negligence of the driver of the Hudson car? And to determine that question it is necessary to make further reference to the evidence.

Griffin, an independent eye-witness of the accident, said (there is no contradiction), at p. 32, line 8, in speaking of the speed of the Hudson car: "I can't really say; I don't think she was travelling extra fast."

Caldwell, another independent eye-witness, said that she was going about 10 or 15 miles per hour; that there was nothing to obstruct her view of a fast approaching car, running "almost in the centre of the road" (see p. 36); that she turned out to pass

the deceased and the truck, and, upon being confronted with the approaching car, suddenly turned to her right, struck the deceased and carried him several feet to and jammed him up against the truck, with such force as to bury at least two feet of the front of the Hudson car under the truck.

To me, the foregoing evidence is most convincing that the standing truck had nothing to do with the accident but that it was due to the culpable negligence of the driver of the Hudson car, who, when she saw the fast approaching car almost in the middle of the street, instead of reducing her speed and retiring behind the deceased and the truck until the fast approaching car had passed, proceeded. It is nothing more than another case of a driver of an automobile "taking a chance" and failing, with this terrible result.

Why did the driver of the Hudson car not have it under control and stop before striking the deceased, as she could have, according to the evidence, at 4 or 5 feet? Is the answer not to be found in the evidence of Peterson, the garage-man, at p. 39, where he says that one or two nights before the accident Janice Crinnian came to his place and asked him about relining the brakes; that he examined them and found they were not in good condition; that she went away, and they were not relined by him. It is, I think, also well to observe—although it may be of no value if the standing truck was the *causa causans*—that there is no evidence whatever that the deceased was not killed outright by the impact of the heavy Hudson car going at the rate of speed I have referred to, before he ever reached the truck.

Counsel for the respondents does not argue that the Crinnians were not negligent, but contends that, if the truck had not been standing where it was, the driver of the Hudson car would have had a sufficient space in which to proceed on the left of the deceased, and no accident would have happened. But the answer to that is, if the truck and the deceased formed an obstruction to a free passage—both were clearly observable—why did the driver of the Hudson car not reduce the speed or stop? No driver of an automobile, and especially in a busy street, has a right to take chances and disregard an obstruction on or any person using the street or highway, if they can be seen in sufficient time to avoid striking them. The bounden duty of a driver, in such circumstances, is to stop, or reduce his speed, and not, in order to avoid an obstruction or a person, run into danger. Reeves was a citizen of Sarnia, a licensed truck-driver, and, as such, had a right to be in Christina-street in carrying on his business and in taking delivery of parcels from the shops abutting thereon, and there is

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1930. from these stores is made from Christina-street and all the bread
and delivery wagons stop for that purpose."

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The statutory duty of a driver, before passing a vehicle and going in the same direction, is to be found in sec. 35, subsec. 10, of the Highway Traffic Act, R.S.O. 1927, ch. 251, which reads:—

"No person in charge of a vehicle shall pass or attempt to pass any vehicle going in the same direction on a highway unless and until the travelled portion of the highway in front of and to the left of the vehicle to be passed is safely free from approaching traffic."

The next question is, had Reeves a legal right to leave his truck standing where and when he did, and was he guilty of any negligence or improper conduct under subsec. 1 of sec. 42 of the Act? That subsection reads:—

"When loss or damage is sustained by any person by reason of a motor-vehicle on a highway, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor-vehicle shall be upon the owner or driver."

Caldwell, one of the independent eye-witnesses of the accident, at p. 35, stated that from the time Reeves left his truck to the time of his return would be "not more than a couple of minutes."

By-law No. 1510 of the Municipal Corporation of the Town of Sarnia, passed in July, 1924, was put in by the plaintiffs, and by their counsel it was argued that under sec. 11 thereof Reeves had no right to stop and leave his truck standing. Section 11 provides:—

"That no motor-vehicle shall stop on any street except in an emergency, unless the two side wheels are within six inches of the kerb, except where angle-parking is authorised and indicated, nor in such a way as to obstruct a free passage of the street."

In the present case, angle-parking was authorised and indicated on the west side of the street; and, if there was a clear passage of at least 20 feet at the left, it is difficult to understand how there could be any obstruction.

I think it would be idle to argue and monstrous to hold that, if Reeves had been a truck-driver residing in a town adjoining Sarnia, and, having business in Sarnia, made purchases from Geddes Bros. on the morning of the 31st October, and in the afternoon, whilst proceeding along Christina-street on his way home, made a temporary stop to go into the rear of that shop for the parcel, it could be said that he was guilty of an interference with

traffic, or of negligence, or any improper conduct, under the Highway Traffic Act.

My judgment is, so far as this by-law is concerned, that Reeves had a legal right to stop where and when he did, and that there was no contravention of the by-law.

But, apart altogether from the Highway Traffic Act and the by-law, there can be no question that Reeves had a common law right to stop his truck in Christina-street, if the stopping thereof did not constitute an interference thereon such as would cause an interruption of traffic. The truck occupied about 6 or 7 feet, and there was left, as has been stated, a free passage of at least 20 feet for traffic. My brother Riddell, in his judgment, which I have read, refers to the cases and reasonings covering this point, and I see no object in again referring to them.

My judgment is that the sole and effective cause of the accident was not the standing truck but the negligence of the defendant Janice Crinnian, the driver of the Hudson car. I would allow the appeal of the defendant Reeves with costs, and dismiss the action as against him with costs.

There being no appeal by the plaintiffs against the defendants the Crinnians, the judgment against them must stand.

Appeal of the defendant Reeves allowed.

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RE TECUMSEH PUBLIC UTILITIES COMMISSION AND MACPHEE.

1930.
Oct. 10.

Trusts and Trustees—Application by Trustee for Opinion, Advice, and Direction of Court—Trustee Act, sec. 59—Determination of Legal Rights—Jurisdiction—Declaration Set aside on Appeal—Costs—Procedure by Originating Notice under Rules 600 to 607.

Upon a summary application under sec. 59 of the Trustee Act, R.S.O. 1927, ch. 150, "for the opinion, advice or direction of the Court," the Court will not determine legal rights.

In re Williams (circa 1861), 1 Ch. Chrs. 372, and *In re Lorenz's Settlement* (1861), 1 Dr. & Sm. 401, 7 Jur. N.S. 402, followed.

Upon an appeal from an order of a Judge of the High Court, made upon the application of the trustee of the assets of a company, under the Bulk Sales Act, declaring that a public utilities commission was not entitled to a lien on the estate of the company for water supplied in certain months nor for the cost of installing a water-main, it was held, that, the application being made only under sec. 59 of the statute, and not by originating notice under Rules 600 to 607, the Court had no jurisdiction to make the declaration; and the appeal was allowed.

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Semble, if the application had been upon originating notice, the Court would have had jurisdiction to determine summarily the rights of the parties.

As to costs, *held*, that the appellant, not having drawn the attention of the Judge of first instance to the decisions referred to, should have no costs of the appeal.

AN appeal by the Public Utilities Commission of the Town of Tecumseh from an order of GARROW, J., of the 23rd May, 1930, made upon the application of Neil Claude MacPhee, trustee of the assets of the Tecumseh Brewing Company Ltd., under the Bulk Sales Act, declaring that the Commission was, on the 1st May, 1929, entitled to a lien on the estate of the brewing company for the amount payable to the Commission for water supplied by it to the company in the months of May, June, and July, 1928, namely \$591.86, but declaring that the Commission was not entitled to a lien for \$1,759.49 for the cost of labour and material expended in installing a water-main for the brewing company. The order was made under the Trustee Act, R.S.O. 1927, ch. 150.

September 22. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

F. A. Landriau, for the appellant Commission.

H. C. Draper, for the trustee.

October 10. RIDDELL, J.A.:—The Tecumseh Brewing Company Ltd. sold its business in bulk to one Waldman, and the respondent, a solicitor, was appointed trustee for creditors under the provisions of the Bulk Sales Act, R.S.O. 1927, ch. 167: at the time of sale there were debts, among them one to the appellant Commission. Being in doubt as to the amount the appellant Commission was entitled to, the respondent moved under the provisions of the Trustee Act, R.S.O. 1927, ch. 150, sec. 59, “for the opinion, advice or direction of the Court.”

The motion came on before Mr. Justice Garrow, and he, on the 23rd May, 1930, “upon hearing counsel for the trustee and the Public Utilities Commission of the Town of Tecumseh,” made a declaration that the appellant Commission had a lien for the price of the water supplied in certain months, but not for that supplied in other months, nor for \$1,759.49 for the cost of labour and material expended in installing a water-main: and he further directed that the costs, which he fixed at a moderate sum, should be paid out of the trust estate.

The Commission appeals to this Court.

I assume, without deciding, that, in view of the very comprehensive language of sec. 1(*q*) of the Trustee Act, the respondent is a “trustee” entitled to apply to the Court under sec. 59;

but it seems to me that the whole proceedings, including the "declaration," are based upon a total misconception of the effect and purpose of the statutory provision for application to the Court. For more than 60 years it has been settled law that the object of this provision is not to determine legal rights—the law as laid down by Mowat, V.-C., in *In re Williams* (circa 1861), 1 Ch. Chrs. 372, has never been questioned.

In that case, the Vice-Chancellor refused, upon such an application, to make a declaration as to the construction of a will, citing the authority of English decisions upon statutory provisions which our own statute copied. Perhaps the clearest explanation of the object of the statute is to be found in the judgment of the English Vice-Chancellor in *In re Lorenz's Settlement* (1861), 1 Dr. & Sm. 401, 7 Jur. N.S. 402. At pp. 404, 405 of 1 Dr. & Sm., the Vice-Chancellor said:—

"My understanding of that section of the Act is, that it was intended by the legislature that the Court should have the power to advise a trustee or executor as to the management and administration of the trust property in the manner which will be most for the advantage of the parties beneficially interested, but not to decide any question affecting the rights of those parties *inter se*. . . . It is true, that, in some cases, the Court has (unadvisedly, as I think), upon a petition under this section given its opinion on questions affecting the rights of parties. But I believe that the Judges generally now consider that it ought not to be done."

The case *In re Hooper* (1861), 29 Beav. 656, 7 Jur. N.S. 595, is to the same effect:—

"The Master of the Rolls stopped the case, observing that the object of this clause was to assist trustees in the execution of the trusts, as to little matters of discretion; and that this was not a case of that description."

The declaration made by the learned Judge in this case is wholly beyond his powers; it is without authority by statute or common law, and therefore must be set aside.

We have more than once declined to award the costs of a successful appeal which has been rendered necessary by the omission of the appellant to bring to the attention of the original tribunal facts of any kind, such as the existence of cases or enactments, which, had they been brought to the Judge's attention, would have prevented the judgment that is appealed against being given. In the present instance, had the attention of the learned Judge been drawn to the decisions I have mentioned, he would have dismissed the application, and there never would have been such an appeal as the present. For this reason, the appellant

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should have no costs of the appeal: of course, the respondent failing, no costs will go to him.

In justice to the counsel who argued this appeal, when their attention was drawn to the real meaning of the statute, both desired that the declaration should be set aside and that they should be left to decide the rights in an ordinary action.

I take it for granted that the respondent, a solicitor, will not deplete his trust funds by paying for this unnecessary, unwarranted and wholly useless proceeding.

LATCHFORD, C.J., agreed with RIDDELL, J.A.

MASTEN, J.A.:—Appeal from an order of Garrow, J., dated the 23rd May, 1930, whereby the appellant is declared entitled to a lien on the lands of the Tecumseh Brewing Company for certain water supplied to the extent of \$591.86, and the appellant's claim for a lien for a further sum of \$1,759.49 for installing a certain water-main is negatived. The application was instituted by a notice dated the 17th May, returnable on the 19th May, and is supported by affidavit evidence. The basis and scope of the application, as shewn by the notice of motion and by the affidavit of the applicant, para. 5 (where he states that he is moving under the provisions of the Trustee Act, R.S.O. 1927, ch. 150, for the opinion, advice and direction of the Court) make it plain that the application is brought solely under the provisions of the Trustee Act, and that the provisions of the Rules of the Judicature Act respecting originating notices are excluded. There must be at least 7 days' notice between the service of an originating notice and the day for hearing. This notice is dated the 17th May, and is returnable on the 19th May. Moreover, while no form of originating notice is prescribed by our Rules of practice, an originating notice ought always to indicate on its face its special character and the nature and basis of the application, so as to distinguish it from an ordinary interlocutory motion in a pending action. For these reasons, I am of opinion that the provisions of the Consolidated Rules relative to originating notices are effectively excluded, and that this application is brought strictly under the Trustee Act alone, as the applicant was undoubtedly entitled to do. See Rule 11 of the Consolidated Rules.

Such being the character of the application, the Court is plainly governed by the principles and authorities referred to by my brother Riddell, and the Judge below had no jurisdiction to make a declaration of the rights of the appellant and respondent *inter se*.

In this case error has arisen from a failure to distinguish between the jurisdiction exercisable by a Judge under sec. 59 of the

Trustee Act, and the jurisdiction possessed by the Court under Rules 600 to 607, upon an ordinary application commenced by originating notice.

If the application had been brought in proper form by way of originating notice, there would under our present practice have been jurisdiction to determine summarily the rights of the parties now before us.

Rule 600 provides that the trustee under any deed or instrument may apply by originating notice for the determination of

(a) Any question affecting the rights or interests of a person claiming to be a creditor;

(g) for the opinion, advice or direction of a Judge pursuant to the Trustee Act;

(h) for the determination of any question arising in the administration of a trust.

Rule 601 provides for notice in such cases to the person whose rights and interests are sought to be affected, and Rule 606(1) is as follows:—

“The Judge may summarily dispose of the questions arising on an originating notice and give such judgment as the nature of the case may require, or may give such direction as he may think proper for the trial of any questions arising upon the application.”

Whether, upon the facts of this case, the question here presented would have been determined summarily, or whether directions ought to have been given for a trial on oral testimony of the question raised, is a matter which would have rested in the discretion of the Judge before whom the application came.

Such direction is not before this Court for consideration, as the application does not come before us in such a form that we can deal with it.

I concur in the order proposed by my brother Riddell, that the appeal should be allowed without costs.

I might suggest that if our Rules required an originating summons to be sealed and issued by the Registrar before service (as is the practice under the English Judicature Act) the error now under consideration would be unlikely to arise.

ORDE and FISHER, JJ.A., agreed with MASTEN, J.A.

Appeal allowed without costs.

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DUCHMAN V. OAKLAND DAIRY CO. LTD.

Oct. 10.

Costs—Taxation—Interpretation of Order of Appellate Court—Joinder of Plaintiffs—Rule 66—General Principles of Taxation—Power of Court—“Otherwise Order”—Apportionment of Costs.

The order of MIDDLETON, J.A., in Chambers (1930), 65 O.L.R. 553, affirmed (ORDE, J.A., *dubitante* on one point).

AN appeal by the defendants from the order of MIDDLETON, J.A., in Chambers (1930), 65 O.L.R. 553.

October 10. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, and ORDE, J.J.A.

R. L. Kellock, for the appellants, argued, first, that the costs of the plaintiff Duchman should not have been allowed on the Supreme Court scale, but only on the County Court scale, with a set-off under the provisions of Rule 649. The action was only a common law action for damages—a qualified money-claim. The injunction was only a remedy, not a cause of action, and so the jurisdiction of the County Court was not ousted: *Bragg v. Oram* (1919), 46 O.L.R. 312; *Duchman v. Oakland Dairy Co. Ltd.* (1928), 63 O.L.R. 111, at p. 134; *Dominion Loose Leaf Co. Ltd. v. Manuel* (1925), 57 O.L.R. 84; *Martin v. Bannister* (1879), 4 Q.B.D. 491; *Parry v. Parry* (1920), 48 O.L.R. 103; *Village of Kemptville v. Kemptville Milling Co. Ltd.* (1924), 27 O.W.N. 90; *De Vries v. Smallridge*, [1928] 1 K.B. 482; *Keates v. Woodward*, [1902] 1 K.B. 532; *Smith v. Smith*, [1925] 2 K.B. 144. The injunction was only ancillary. Secondly, the plaintiff Duchman was entitled to tax against the defendants one-fifth only of the general costs of the action and the appeal, and the defendants were entitled to tax against the plaintiffs Labowitz and Appelbaum the whole of any costs relating exclusively to the claims of those plaintiffs, and two-fifths of any costs incurred equally in resisting the claims of all the plaintiffs, and, as against the plaintiffs Mary Most, Nathan Most, Izzie Klein, Esther Applebaum, and Abraham Labowitz, four-fifths of the defendants' costs incurred in resisting the appeal of the plaintiffs to the Divisional Court: *Keen v. Towler* (1924), 41 Times L.R. 86.

R. T. Harding, K.C., for the plaintiffs, respondents, was not called upon.

THE COURT (ORDE, J.A., *dubitante* as to the second point) agreed with the reasons and conclusion of MIDDLETON, J.A.

Appeal dismissed with costs.

[ORDE, J.A.]

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Oct. 14.

Dentist—Extraction of Teeth—Exceeding Instructions—Honest Misunderstanding—Neglect to Take Proper Precautions to Avoid Misunderstanding—Negligence—Action for Assault—Time of Bringing—Dentistry Act, sec. 28—Application to Conduct of Defendant—“Negligence by Reason of Professional Services Rendered”—Action Barred—Provisional Assessment of Damages.

The plaintiff went to the defendant, a dentist, to have a tooth extracted. The defendant, by an honest misunderstanding of the plaintiff's instructions, extracted, after he had put the plaintiff under an anæsthetic, twelve teeth, and the plaintiff brought this action for trespass, assault and battery, upon his person:—

Held, upon conflicting evidence, that the words which the plaintiff used when instructing the plaintiff, if properly understood, were sufficient to indicate to the defendant that the plaintiff wanted one tooth out and no more; the defendant was negligent in that he failed to make sure what he had to do before rendering the plaintiff unconscious; and, on the merits, the defendant was liable to the plaintiff in damages.

Held, however, that, as the action was not begun within 6 months from the day of the operation, it was barred by sec. 28 of the Dentistry Act, R.S.O. 1927, ch. 198.

The statutory provision was not intended to make any narrow distinction between the negligent doing of the particular thing for which the patient employs the dentist and the doing as a result of his negligence of something in excess of that particular thing. If as a result of his engagement professionally he is guilty of negligence in carrying out the engagement, he is entitled to the protection of the statute, provided that the negligent excess was the doing of something in the exercise of his profession.

Having regard to the plaintiff's age (60), the diseased condition of his teeth, and the fact that their removal had done no real injury to his health, his damages, if he should be ultimately held entitled to recover, for the wrong and for his pain and suffering, as well as any expense to which he had been or might be put for plates and artificial teeth, ought to be assessed at \$800.

ACTION for damages for an alleged trespass, assault and battery, upon the person of the plaintiff, in that the defendant, a dentist, when employed by the plaintiff to extract one tooth, wrongfully extracted twelve teeth.

October 2 and 3. The action was tried before ORDE, J.A., without a jury, at a Toronto sittings.

J. C. McRuer, K.C., for the plaintiff.

Lyle Ramsey, for the defendant.

October 14. ORDE, J.A.:—The action is brought against the defendant, who is a member of the Royal College of Dental Surgeons of Ontario, and has practised dentistry in Toronto for 29 years, specializing in dental surgery. That special practice includes the operation of extracting teeth.

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The plaintiff is a director and the manager of Boase Limited, a company engaged in the manufacture and sale of ladies' costumes. He is 60 years of age and from his own evidence is quite well-to-do.

The plaintiff claims damages for an alleged "trespass, assault and battery, upon his person," because the defendant, as alleged, when employed by the plaintiff to extract one tooth, wrongfully extracted twelve teeth.

The defendant denies the plaintiff's allegations and in addition pleads the protection afforded dentists by sec. 28 of the Dentistry Act, R.S.O. 1927, ch. 198, the action not having been commenced until after 6 months from the commission of the alleged wrongful act.

The plaintiff for some years had been attending, first, Dr. Wm. F. Elliott and, later, Dr. Andrew J. McDonagh, for his teeth. Dr. Elliott is a general practitioner of many years' standing. Dr. McDonagh has practised dentistry for 42 years and has specialized for 25 years in periodontia, which is apparently the proper dental term for what is commonly called pyorrhœa.

Dr. Elliott had attended the plaintiff for 7 or 8 years up to about 1926. According to his evidence, the plaintiff's teeth were in very bad condition as the result of pyorrhœa, which he tried to ward off but without success. It was his opinion that the plaintiff would in time lose all his teeth, and he advised the plaintiff to have them extracted and particularly the upper ones.

Some time in 1928 the plaintiff consulted Dr. McDonagh, who found that all the upper teeth had pyorrhœa except one, which was also badly diseased with an abscess at its roots. He says the upper teeth were too far gone for treatment and he advised the plaintiff to have them all out. During the course of his visits to Dr. McDonagh an X-ray was taken of his teeth on the 24th July, 1928, but the plates or sciagraphs were for the time retained by Dr. McDonagh. The plaintiff's visits to Dr. McDonagh ceased after the 27th July, 1928.

Dr. McDonagh says that the plaintiff knew that he ought to have his teeth out, but that he didn't want it, and he further says that he did not say that only one should come out and the others be allowed to remain.

The plaintiff did nothing more about his teeth until a few days before the 26th November, 1928, when he called on Dr. McDonagh, and, according to his own story, told Dr. McDonagh that he had summoned up the courage to have the one tooth out, by which he meant the abscessed tooth already mentioned. Dr. McDonagh then made or caused to be made an appointment with the defendant

for the plaintiff. This appointment does not appear to have been made either by Dr. McDonagh or with Dr. Paul directly, but by their respective employees, and presumably by telephone, and, as neither employee was called, there is no evidence as to what were the instructions or information, if any, given by one office to the other as to the nature or extent of the work which Dr. Paul was to do.

Dr. McDonagh then gave the X-ray plates to the plaintiff. The plates are mounted on a card, and upon the card, which with the plates was put in as exhibit 1, at the trial, there is a small pencilled arrow pointing to the diseased tooth which the plaintiff intended to have removed. No further information or instruction seems to have passed from Dr. McDonagh to Dr. Paul, and there was no card shewing diagrammatically all the teeth with a mark or marks indicating the tooth or teeth to be extracted, which it was admitted is customary when one dentist sends a patient to another dentist for that purpose.

The plaintiff called at the defendant's office on the 26th November, 1928, to keep the appointment. The defendant was engaged at the time, but one of his attendants shewed the plaintiff into the operating room, which the defendant entered shortly after. Then there followed a short conversation between the plaintiff and the defendant, as to which the evidence is contradictory.

The plaintiff says that he handed to the defendant the X-ray plates and told him it was the X-ray with the tooth marked that was to come out. He says, further, that he told the defendant that Dr. McDonagh had said that he ought to have all his teeth out but that he would not think of it, and that he was shortly going for a trip abroad. He was given gas and when he again became conscious he felt so strange that he said, "My God, doctor, what have you done?" to which the defendant replied, "I have taken your teeth out," and that he thought that was what the plaintiff wanted.

Dr. Paul's evidence as to the earlier conversation is quite different. He knew nothing of the precise purpose of the appointment which had been made by one of his staff. When he entered the operating room, the plaintiff was there. The defendant was shewn the X-ray plates and he says he called attention to some impacted teeth in the lower jaw and that the plaintiff said, "I have to have all my upper teeth out," and also asked if that many teeth could be taken out under gas. The defendant asked the plaintiff if he had made any arrangements about having his teeth replaced, and the plaintiff replied that he had not, and that he was contemplat-

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ing a trip abroad. Dr. Paul then told the plaintiff that his pride was evidently not hurting him.

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The plaintiff then went under the anæsthetic, and the defendant removed his upper teeth, twelve in all. When the plaintiff came to, he was surprised and asked if the defendant had taken all his upper teeth out, to which the defendant replied, "That is what you said, wasn't it?" The plaintiff said, "I didn't want them all out to-day," and then went on to tell him, the defendant, that Dr. McDonagh had wanted to have them all out but that he, the plaintiff, did not want it.

Dr. Paul admits that, from the plaintiff's manner and conduct when he became conscious, the plaintiff must have intended, when he came in, to have only one tooth out, but he maintains that the plaintiff's instructions were as already stated.

It is quite clear to me that the plaintiff went to the defendant's office to have one tooth removed, and no more, and that, whatever he may have said to the defendant, he did not intend to instruct the defendant otherwise. It is hardly to be believed that the plaintiff, having regard to his business position and his means, would bring such an action as this if he had really wanted all his upper teeth removed that day.

On the other hand, it is not to be believed that the defendant, if he understood that one tooth only was to be removed, would deliberately extract eleven others.

From his evidence I gathered that the plaintiff thought, when he entered the defendant's office, that the defendant not only knew what the appointment was for, but that he knew, from the instructions which the plaintiff supposed the defendant had received from Dr. McDonagh, that only one tooth was to be taken out. And the plaintiff relies upon the information which the plates furnished in support of this. I think it is clear, however, that, whatever may have passed between the respective employees of the two dentists, who made the appointment, Dr. Paul was not aware of the exact work he was to do when he entered his operating room and met the plaintiff there. He depended upon what the plaintiff told him for his instructions.

The plaintiff says that when he handed the plates to Dr. Paul, he did not point out the tooth to be removed, because "the mark was too glaring." And apparently he did not point out the tooth itself. Oddly enough, he cannot say in what way the tooth was marked, but he does not think that the small pencilled arrow was the mark he meant. Dr. Paul says he did not see the arrow. Dr. McDonagh says he cannot recall that he marked the plate, though he may have put the arrow there, but that if he did so it was not

for the purpose of instructing any other dentist. Dr. Paul says that the plates have remained in his possession since the operation and have not been altered. The arrow is by no means a glaring mark; and, as that is disclaimed by the plaintiff as the mark he recalls, it is difficult to know what sort of mark it was that the plaintiff had in mind. I cannot help thinking that his memory as to this is at fault, and that what he means is the faintly pencilled arrow.

There is no other evidence to assist me in arriving at a conclusion upon the only point in issue. It is true that one of the defendant's nurses was called, but her evidence was very unsatisfactory, and I am afraid was coloured to assist her employer. She was in and out of the room before the operation and heard only snatches of the conversation. She remembers only that the plaintiff said he was having all his upper teeth out. Had she been present all the time, this would be important; but, in view of the plaintiff's evidence that he told the defendant that Dr. McDonagh had said he ought to have them all out, what the nurse heard may have been but a part of this statement which she misunderstood. If there were nothing else, I would hesitate to accept her evidence as to this scrap of conversation at all.

But the nurse further says that when the plaintiff came into the rest-room after the operation, he said he was glad it was over, it was the best thing for his health, as his teeth had been troubling him for some time. The plaintiff denies having said any such thing; and, having regard to his conduct in the operating room immediately after he regained consciousness, it is not credible that he would have used any such language in the rest-room as the nurse ascribed to him, and I must say that I do not believe her evidence on this point.

So that I am driven to weigh the conflicting evidence of the plaintiff and the defendant as to the instructions given by the one to the other. Having heard and seen both parties in the witness-box and having weighed their statements, I prefer that of the plaintiff to that of the defendant. As I have already said, there can be no doubt that the plaintiff went to the defendant's office for the purpose of having one tooth removed, and it is not in the nature of things that he could have deliberately instructed the defendant to remove all his upper teeth. I am satisfied, and I so find, that the words he used when instructing the defendant, if properly understood, ought to have been sufficient to indicate to the defendant that the plaintiff wanted one tooth out and no more.

In so finding I wish it to be understood that I do not charge the defendant with a deliberate misstatement of the facts. I think

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Orde, J.A. the defendant misunderstood the plaintiff's instructions and in some way got the impression from the plaintiff's statement that Dr. McDonagh thought that all his upper teeth should come out—that that was what the plaintiff wanted. But I cannot for this reason absolve the defendant from his neglect to take what seems to me to be the most obvious and necessary precautions. There ought not in such cases to be any room for any misunderstanding of instructions. Once the patient is under the anæsthetic he is helpless and is unable to stop the dentist who may inadvertently or through some misunderstanding exceed his instructions.

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There was not in the present case the safeguard of any instructions from Dr. McDonagh in the form of a chart or card; or of a letter, such as is customary, though, as I understand it, not obligatory. The absence of any such instructions made it all the more necessary that the defendant should have been quite sure as to what he had to do before putting the plaintiff under the anæsthetic.

In that he failed to safeguard himself and the plaintiff, in the way I have mentioned, against the consequences of the misunderstanding which actually occurred, the defendant in my judgment was negligent. And in so far as my finding against the defendant is based upon the merits, I rest it upon that ground and not upon any suggestion that the defendant deliberately or even inadvertently exceeded what he understood to be the plaintiff's instructions.

For these reasons, I think that on the merits the defendant is liable to the plaintiff in damages, unless the plaintiff's action is barred by sec. 28 of the Dentistry Act.

Section 28 is as follows: "No duly registered member of the Royal College of Dental Surgeons shall be liable to any action for negligence or malpractice, by reason of professional services requested or rendered, unless such action is commenced within 6 months from the date when in the matter complained of such professional services terminated."

The date of the operation was the 26th November, 1928, and the writ was not issued until the 6th July, 1929, so that, unless the wrong complained of does not come within the range of that section, the plaintiff cannot recover.

The statement of claim has been very carefully framed so as to exclude any theory of negligence or malpractice in performing the services which the defendant was employed to render, and to present the plaintiff's case as one of trespass or assault to his person. And it is argued that, while the Act would protect the defendant in respect of the negligent removal of the one tooth he

was instructed to remove, it affords no protection at all to the defendant if, when instructed to remove one tooth, he proceeds, even as the result of a misunderstanding, to remove other teeth. On behalf of the defendant it is urged that the section in question is intended to protect dentists in the practice of their profession, and that if the alleged act of negligence consists of something done by the dentist as a dentist then the section applies.

This section in the Dentistry Act has never come up for construction; and, while the corresponding section in the Medical Act, R.S.O. 1927, ch. 196, sec. 39, which is in precisely the same language except that the limitation is one year instead of 6 months, has come up for construction on several occasions, I cannot find that the point raised has ever been mentioned.

That this type of enactment is intended mainly for the benefit of the profession was stated by Meredith, J., in *Miller v. Ryerson* (1892), 22 O.R. 369, at p. 373; and, while the section must be strictly construed, I can see no reason for seeking to restrict the fair meaning of its language by attempting to apply it too narrowly. The purpose, broadly speaking, of the provision must be to protect the dentist against belated actions for damages alleged to have been sustained in consequence of his negligence or malpractice during the course of his employment. I do not think the legislation intended to make any narrow distinction between the negligent doing of the particular thing for which his patient employed him and the doing as a result of his negligence of something in excess of that particular thing.

A dentist could hardly appeal to the Act for protection if he waylaid a man in the street and pulled a tooth out, but the foundation for the protection rests on the fact that the dentist has been employed to render professional services. The words of the section are "negligence or malpractice by reason of professional services requested or rendered." If as a result of his engagement professionally he is guilty of negligence in carrying out the engagement, he is in my opinion entitled to the protection of the Act, whether such negligence was in the doing of the precise thing covered by the employment or went beyond it, provided that the negligent excess was the doing of something in the exercise of his profession. Any other construction is in my opinion too narrow.

In the present case everything the defendant did was done in the exercise of his professional skill, and his negligence arose in carrying out, or as a result of, his employment by the plaintiff. I think, therefore, that the defendant is entitled to the protection of sec. 28, and that, notwithstanding my finding in favour of the plaintiff, the action must be dismissed.

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I ought in case of the reversal of my judgment upon an appeal to fix the plaintiff's damages. That is not easy. If the defendant had been guilty of a deliberate act of assault or trespass to the plaintiff's person, the damages might be exemplary or punitive; but in the present case they cannot properly be assessed on any such footing. If the defendant had been a young man with a perfect set of upper teeth, their wrongful removal might justify heavy damages. When the element of deliberate wrongdoing is removed, the measure of damage, even if the teeth had been perfect, could hardly be different from a case where one's upper teeth were all knocked out in a motor-car collision.

In the present case, I think there can be no doubt that most, if not all, of the plaintiff's upper teeth would have to be extracted at an early date. For that reason they cannot have had the same value to him, however much he might have wished to treasure them, as when they were in a less diseased condition. I am satisfied from the evidence that he is really in a better state of health than before the operation, and I think it is probable that the removal of his teeth had something to do with that improvement.

Applying to the case the best judgment that I can, and having regard to the plaintiff's age, the diseased condition of his teeth, and the fact that their removal has done no real injury to his health, I think that his damages, if he is ultimately held entitled to recover, for the wrong and for his pain and suffering, as well as for any expense to which he has been or may be put for plates and false teeth to replace those removed, ought to be assessed at \$800.

For the reasons already given, the plaintiff's action must be dismissed with costs.

[APPELLATE DIVISION.]

WEIR V. GRAND.

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Oct. 14.

Agency—Commission on Sale of Land—Written Authority of Agent Limited to Sale at Fixed Price—Sale Ultimately Effected by another Agent at Lower Price—Statute of Frauds, sec. 11.

The plaintiff, a real estate agent, having a client who, he thought, might be interested in the purchase of the defendant's property, approached the defendant seeking permission to offer the property to his client, at the same time obtaining for himself a commission if his client should purchase. Letters passed between the plaintiff and defendant in regard to the price of the defendant's property and the rate of the plaintiff's commission. On the 1st January, 1928, the defendant wrote to the plaintiff: "I . . . mentioned before in a letter to you that I agreed to your commission of 3 per cent. providing you effect a sale. I could not consider \$75,000. I must have \$85,000, and I hope you will succeed in getting that amount." On the 1st February the plaintiff forwarded an offer to purchase at \$75,000, which was refused by the defendant. The plaintiff's client was not mentioned by name to the defendant, but it was in fact the M. S. company, and that company wished the plaintiff to get the defendant to give an option of purchase at \$80,000. It appeared that a certain trust company had the property for sale as the defendant's agent, and the plaintiff knew that. The solicitor for the M. S. company took the matter up with the trust company, and that company ultimately offered to buy the property for \$80,000, and the defendant accepted the offer. The plaintiff thereupon brought this action for a commission of 3 per cent. on \$80,000:—

Held, that by the letter above quoted, which was relied upon to satisfy sec. 11 of the Statute of Frauds, the defendant had fixed a minimum price for sale and promised a commission if the plaintiff effected a sale at that price; this the plaintiff failed to do, and he had no authority to effect a sale or to procure a purchaser at any other price.

The plaintiff's was a limited mandate, and upon the facts, apart from the effect of the statute, the action failed.

And *held*, that the statute presented an insurmountable obstacle to the plaintiff's success—he had an agreement for a commission to be paid to him in case he effected a sale at \$85,000, and had no agreement in writing for payment of a commission in case of a sale at any other figure; and, his mandate being limited, the price named was a material factor and not merely a figure mentioned to serve as a basis for negotiations (*Weaver v. Dixon* (1928), 62 O.L.R. 419).

Howard v. George (1913), 49 Can. S.C.R. 75, distinguished.

An appeal by the plaintiff from the judgment of MEREDITH, C.J.C.P., at the trial, dismissing the action as against the defendant E. G. Grand without costs and as against the defendant K. W. G. Grand with costs. The action was brought to recover a sum of money as commission on a sale by the defendant E. G. Grand of real property in London, Ontario.

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September 15. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, JJ.A.

A. R. Douglas, for the appellant, argued that the learned trial Judge erred in finding that there was a limited and not a general authority on the part of the appellant to sell the property of the defendant E. G. Grand. He relied on the general principle that an agent who introduces an ultimate purchaser is entitled to the commission agreed to be paid upon the sale of the property: *Hunt v. Emerson* (1914), 32 O.L.R. 532. The fact of non-disclosure of the real purchaser is not a fraud upon the vendor, in the circumstances of this case. In any event, where the vendor subsequently deals with the purchaser direct, he cannot assert that fraud has been committed by the action of the agent: *Fraser v. Harrison* (1924), 56 N.S.R. 431; *King v. Schon* (1918), 44 D.L.R. 111. The contract with the plaintiff was a general contract of agency to sell at the best price he could get. The facts of this case bring it within *Howard v. George* (1913), 49 Can. S.C.R. 75. Reference also to *Stratton v. Vachon* (1911), 44 Can. S.C.R. 395; *Montreal Agencies Ltd. v. Kimpton*, [1927] S.C.R. 598; *McBrayne v. Imperial Loan Co.* (1913), 28 O.L.R. 653.

R. S. Robertson, K.C., for the defendants, respondents, contended that there was no general employment of the appellant as agent, and further that the evidence shewed that the appellant was in no position to accept such general employment, because he was at the time employed by the Metropolitan Stores, the real purchaser, and had been for years its general agent for the purchase of property. The plaintiff never could or did get an offer for \$80,000, as appears from the evidence. Reference to *Simonite v. Moram*, [1930] S.C.R. 334; *Barkley v. Bush* (1929), 63 O.L.R. 678; *Weaver v. Dixon* (1928), 62 O.L.R. 419; *Travis v. Coates* (1912), 27 O.L.R. 63. If this is a general contract, then the disloyalty of the agent in not making a full disclosure as to the real purchaser disentitles him to commission in any event. Under the Statute of Frauds, R.S.O. 1927, ch. 131, sec. 11, there must be a promise to pay a commission upon the transaction which actually occurs.

October 14. The judgment of the Court was read by GRANT, J.A.:—This is an appeal from the judgment of the Chief Justice of the Common Pleas, who tried the action without a jury, the judgment being pronounced on the 2nd April, 1930, whereby the plaintiff's claim for a commission on the sale of certain real property in the city of London, Ontario, was dismissed.

The plaintiff, a real estate agent, alleged that he had been

instructed and authorised as general agent to effect a sale of the property in question, which was known as the Grand Building, in Dundas-street, in the city of London. The defendant E. G. Grand resided in London, England, and her son and co-defendant, K. W. G. Grand, in New York city, where he was engaged in some capacity in the service of the Great Western Railway of England. The defendants denied that the plaintiff had been appointed as general agent for the purpose mentioned; denied further that he had effected a sale of the property; and also set up the provisions of the 11th section of the Statute of Frauds, by which it is provided that no such action shall be brought "unless the agreement upon which such action shall be brought shall be in writing separate from the sale agreement and signed by the party to be charged therewith or some person thereunto by him lawfully authorised."

Some question was raised as to the extent of the authority of the son, K. W. G. Grand, on behalf of and as representing his mother, but it is apparent, from perusal of the correspondence, that his authority must have been of a very limited character, as he had to submit to her, for her approval or the reverse, questions as to the rate of commission to be paid and as to the amount of the purchase-price, and when a definite offer was made he had to submit it to her before he could give any definite answer in respect of it. I do not think that anything turns upon the nature or extent of the authority of the son.

A perusal of the correspondence placed upon the record appears to me to make it quite clear that the plaintiff was not given any general authority or mandate to effect a sale of the property. On the contrary, in my opinion, his conduct in the matter was quite incompatible with his having any such general authority or mandate from the defendants.

The first letter put in (exhibit 1) bears date the 28th July, 1927, was written by the plaintiff to K. W. G. Grand at New York, and reads (in part) as follows: "Re sale of 140 Dundas-street. Since you were in our office last spring, our client, who was interested in your store at 140 Dundas-street, this city, has purchased another piece of property . . . With proper attention I believe that it would still be possible to persuade him to buy your property. I would be glad to hear from you regarding this, and if you wish us to try to make the sale, and would be willing to pay us a commission for so doing, we will immediately get busy and see what can be done."

It is manifest that the plaintiff, being engaged in the real estate business, and having a client who, he thought, might be interested in the purchase of the defendants' property, approached

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the defendants seeking permission to offer the property to his (the plaintiff's) client, at the same time obtaining for himself a commission if his client should purchase.

The son replied asking what commission would be required if the plaintiff made a sale. The plaintiff purported to send to the son a card shewing the rates of commission, which, however, was apparently not enclosed, but, in addition, he told him that the rate on such a property was 3 per cent. In this letter, which is dated the 19th August, 1927, he states: "Of course you will have to take this" (that is the commission to be paid) "into consideration when you are deciding on the price which you will accept, and for that reason it is better to have a clear understanding in advance."

It is to be noted that the plaintiff is endeavouring to find out what price the owner will "accept" rather than what price the owner might think should be paid. In his reply of the 2nd September, the son stated that the price asked for the property was \$95,000, but that any reasonable offer would be considered. He also suggests that the rate of 3 per cent. for the commission seemed to be high for a property of that value. On the 7th September, the plaintiff's manager replied to the effect that the plaintiff was not disposed to reduce the amount of his commission, and mentioned that the plaintiff had a good many more properties listed with him for sale in respect of which the owners were quite satisfied to pay that rate of commission in case a sale were effected. He then proceeds: "I really think we have an opportunity to sell your store to our clients, but do not think it would be wise from our point of view to sell your property if we can get more for selling a different one." It is to be noted that there is no suggestion in the letter that the defendant E. G. Grand should list her property with the plaintiff for sale, as had been done, according to his statement, by many other owners of properties for whom he was acting as agent. On the contrary, the plaintiff again emphasises the fact that he is asking to be permitted to offer the property to his (the plaintiff's) client.

The son states that he is advising his mother to agree to the rate of commission asked by the plaintiff and that he will advise him further when he has her authority. On the 9th November, the plaintiff again writes to Mrs. Grand in England, part of the letter being as follows: "Your son suggested that we ask \$90,000 for it, but this price is too high. Will you kindly let me know by return mail the very lowest price you can take—the existing lease will make no difference to our client."

There being no evidence that the plaintiff had made any attempt to effect a sale at \$90,000, and his making the request to

the defendant that she inform him of "the very lowest price you can take," and his further reference to "our client," to whom the existing lease would make no difference, seem to me entirely out of keeping with the course which should be followed by one who was acting honestly and whole-heartedly on behalf and solely in the interests of the owner of the property which is to be sold.

In reply to the above letter Mrs. Grand herself wrote from England to the plaintiff stating that she thought that \$90,000 was not too much to ask for the property, and she proceeds: "Will you kindly let me know the highest offer your client is prepared to make? I take it for granted he has made a definite offer for it."

On the 8th December, the plaintiff again wrote to Mrs. Grand, referring to the assessed value of the property and proceeding: "At present we are in a position to get a cash offer of \$75,000, but your son thinks this is not sufficient, so we will endeavour to obtain an offer of at least \$80,000, which I think is a fair price." He also tells her that 3 per cent. is his rate of commission.

The son wrote the plaintiff on the 13th December, confirming a statement which he had made verbally in the preceding week, to the effect that his mother was asking \$90,000 for the property, and he proceeds: "As agreed, she will pay you 3 per cent. commission on the sale-price if this property is disposed of through your firm." On the 1st January, Mrs. Grand again wrote the plaintiff a letter in which she states (in part): "I think I mentioned before in a letter to you that I agreed to your commission of 3 per cent. providing you effect a sale. I could not consider \$75,000. I must have \$85,000, and I hope you will succeed in getting that amount." It is to be noted that she agreed to payment of a commission of 3 per cent. "*providing you effect a sale,*" and that she said she must have at least \$85,000.

The plaintiff again wrote the son on the 12th January, referring to "our clients" and the fact that he could get an offer from them of \$75,000, which however was not thought likely to be of any use. Grand junior, on the 14th January, wrote the plaintiff a letter in which he states: "I might obtain consideration of your clients' offer of \$75,000 if you could obtain a definite written offer on these lines. In any event this would start things moving and be a step in the right direction." On the 1st February, the plaintiff wrote Grand junior: "I am enclosing an offer to purchase your Dundas-street property which I think will explain itself. The price of \$75,000 is the best which we were able to get, and as it is only good until the 1st March, I hope that you will hurry things up all you can. . . . I really think that this is a fair offer and that it would be inadvisable for you to let the thirty days pass. I

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would hate to see them allowed to back out now that we have them signed up."

It may be noted in passing that the plaintiff, in writing to Mrs. Grand on the 8th December, expressed the opinion that \$80,000 was a fair price, and on the 1st February he thinks that \$75,000 is a fair offer.

On the same date the plaintiff wrote Mrs. Grand advising her that he had sent a written offer of \$75,000 to the son, and he proceeds in the latter part of this letter to depreciate her property, telling her that other property less than a block west of hers, "which was once good business property, is now hard to sell at any price." On the 6th February, Grand junior wrote the plaintiff that "the offer you have made for Mrs. Grand's property (140 Dundas-street) is not accepted and the deposit should therefore be returned to your clients."

What took place after the refusal of the offer of \$75,000 is told by the witness DeMarto, general manager of the Metropolitan Stores Ltd. It appears from the evidence that the plaintiff acted for the Metropolitan Stores and their solicitor, Mr. Murphy, for some time prior to the occasion on which the Grand property came under consideration, and had obtained for Metropolitan Stores Ltd. other properties which they desired to acquire. It is quite apparent that the plaintiff was endeavouring to obtain a property or properties for Metropolitan Stores Ltd. and that this was the reason for his approaching the defendant E. G. Grand or her son, in regard to her property. Riley, the plaintiff's manager, states in his testimony that Metropolitan Stores were their clients and also states that they did not divulge to Mrs. Grand the fact that Metropolitan Stores, who owned the building next to hers in Dundas-street, and who would be likely purchasers, were considering her property. When asked for an explanation for the secrecy observed by the plaintiff in that regard, Riley gave as the reason—"because Mr. DeMarto told me that if there was anything given out about who was buying it they would not buy at all."

After the offer of \$75,000 had been refused, DeMarto states that Riley, the plaintiff's representative, endeavoured to get him to make a higher offer, but that he told Riley they were not prepared to make any other offer unless they were sure it would be accepted. DeMarto states (evidence, p. 23) that his offer was \$70,000, which he was induced to raise to \$75,000, and that was refused: and that Riley then tried to get him to commit himself to a price of \$80,000, but he refused to do so unless he received a definite assurance that it would be accepted, and that Riley "said he would endeavour to get a definite option to sell the property

which would protect any offer I should make." He states further that Riley was not successful in obtaining an option. DeMarto on cross-examination (p. 24) gives the following answers to questions put to him:—

"Q. What you wanted, I understand, Mr. DeMarto, was that Riley should get you an option on the purchase of the property at \$80,000, to get Mrs. Grand to give you an option of purchase on the property at \$80,000; that is what you wanted? A. I wanted him to get it so that we would be protected.

"Q. You wanted to get an option to the Metropolitan Stores or to Mr. Murphy to sell the property at \$80,000? A. That is true.

"Q. That is what you asked him to get? A. Yes."

Counsel for the defendants put in part of the plaintiff Weir's examination for discovery, and on p. 28 of the evidence I find the following:—

"27. Q. Did you get any offer for \$80,000 for the property? A. We considered an offer of \$80,000 made as our offer.

"28. Q. Did you get any offer in writing or verbal from any one of \$80,000 for this property, if so from whom? A. I suppose I should say 'no.'

"36. Q. Did you know when you first thought of looking for a purchaser of the property that the London and Western Trusts had the property for sale? A. We surmised they would have it for sale. . . .

"38. Q. I didn't ask you what you thought; didn't the manager of the London and Western Trusts Company, before you made any arrangement with Mrs. Grand, say that the London and Western Trusts Company had the property for sale? A. Yes, I would say they did do that, sir."

It seems to me quite manifest that Riley, who was the plaintiff's representative, could not, in any view of the above, be considered a general agent of the defendant, nor indeed could he, in my opinion, be considered to have been acting in the defendants' interests at all. The plaintiff was promising to endeavour to obtain from the defendant E. G. Grand an option on her property, for the benefit of the prospective purchaser, who would not be legally bound to take up the option.

If it were necessary to a decision of the appeal, I should be prepared to hold that the conduct of the plaintiff was such as to cause a forfeiture of his right to any remuneration, even if his claim to commission were otherwise well-founded. In the view, however, which I take of the facts, it is not necessary so to hold.

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Mr. Murphy was solicitor for Metropolitan Stores, and he was informed by the London and Western Trusts Company that they had been the defendants' agents in charge of the property in question for some time, and that any negotiations with a view to the purchase of that property must be conducted with the trust company. Mr. Murphy, on behalf of the Metropolitan Stores Ltd., took the matter up with the trust company, and ultimately agreed to purchase the property for the sum of \$80,000. The plaintiff thereupon demanded from the defendants a commission at the rate of 3 per cent. on the amount of the selling price.

In support of the plaintiff's case the decision of the Supreme Court of Canada in *Howard v. George*, 49 Can. S.C.R. 75, was relied upon as establishing that the authority of the plaintiff was in the nature of a general agency for the sale of the property; and that the price which was stated was merely to serve as a basis for negotiations, in the sense expressed by Lord Watson in *Toulmin v. Millar* (1887), 58 L.T.R. 96, where that learned Law Lord gives illustrations by which to distinguish different cases of agency on the sale of real property. In *Howard v. George* the authority was given in a letter to the plaintiff signed by the defendant, in which the latter agreed to sell his hotel for \$40,000, and added: "I will pay you 5 per cent. commission on purchase-price." The defendant subsequently sold the property to a purchaser introduced by the plaintiff, but at the sum of \$34,000. It was held that "purchase-price," as used in the letter, had reference to any price for which a sale might be made, and that, *construed in connection with the conduct of the parties*, the memorandum was sufficient, under the Statute (of Frauds), to entitle the plaintiff to recover a commission at the rate mentioned for his services in regard to the sale made at the reduced price to the purchaser introduced by him. *Toulmin v. Millar, supra*, and *Burchell v. Gowrie and Blockhouse Collieries Ltd.*, [1910] A.C. 614, were relied upon.

It is manifest from a perusal of the opinions expressed by the different members of the Court that they were guided to the construction which they placed upon the authority given, by the conduct of the parties and the evidence generally upon the record in the case. The Chief Justice based his opinion "on the facts in evidence" (p. 76). Davies, J., says (p. 76): "The language of the agreement is somewhat ambiguous but, in view of the conduct of the parties under it, I think the construction," etc. Idington, J., states that the document signed by the appellant was not a mere option but a general retainer, enlisting the plaintiff's services to sell "for either said sum or such other sum as the appellant accepted," and he goes on to say, as to the construction of

the writing. "Such doubt as we might possibly have from its ambiguity has been settled by the conduct of the parties" (pp. 76 and 77). Duff, J. (p. 77), states: "Interpreting the memorandum in question by the light of the subsequent conduct of the parties (which one is entitled to do, because it is impossible to say that the memorandum is capable of only one necessarily exclusive construction) I think the respondent's agency was a general agency within the meaning of Lord Watson's language in *Toulmin v. Millar*." Anglin, J. (p. 77), states that on the interpretation of the contract he agrees with the courts of Alberta. The Alberta courts, in their interpretation of the contract, had been assisted by the conduct of the parties. The opinion of Brodeur, J., is to the same effect.

In the *Howard* case the language used, being open to more than one interpretation, was construed, in the light of the conduct of the parties, in such a manner as to constitute a general agency or mandate for the sale of the property in question, the price named being considered to have been stated merely as a basis of negotiations. In the case at bar, the defendant Mrs. Grand, owner of the property, expressly stated that she agreed to the commission of 3 per cent., "providing you effect a sale. I could not consider \$75,000. I must have \$85,000, and I hope you will succeed in getting that amount." She did not at any time recede from that position. The plaintiff did not obtain for her a purchaser at \$85,000. The offer of \$75,000 was definitely rejected by her. The plaintiff's witness DeMarto states that the plaintiff tried to induce him to raise his offer to \$80,000, but that he refused to do so, and that the plaintiff then endeavoured to obtain from the defendant E. G. Grand an option on the property at \$80,000, but failed to do so. This conduct on the plaintiff's part, namely in endeavouring to get an option for the benefit of the purchaser, rather than making an honest effort to effect a sale for the defendant E. G. Grand, alleged to be his principal, is quite typical of his behaviour throughout the whole matter. It is sufficient, however, to note that, not only did the plaintiff not obtain a purchaser at \$85,000, the minimum price fixed to him by the defendant Mrs. Grand, but on the contrary he was not even successful in obtaining an offer at \$80,000, and in so far as the plaintiff was concerned the matter was at an end. The trust company, which had the property in its hands for several years, and which, to the knowledge of the plaintiff, according to his admission referred to above, had the property for sale, was successful in obtaining an offer to its principal, the defendant Mrs. Grand, at \$80,000, which offer she accepted.

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In my judgment the principle applied in the *Howard* case is not in any way applicable to the state of facts in the case at bar. The writing relied upon to satisfy the Statute of Frauds fixed a minimum price for sale, and commission was promised if the plaintiff effected a sale at that price. This the plaintiff failed to do and he had no authority to effect a sale or to procure a purchaser at any other price. Both by the writing, and from the conduct of the parties, it is in my opinion abundantly clear that the plaintiff's was a limited mandate only and that even upon the facts, apart from the effect of the statute, the plaintiff must fail. I am of opinion also that the defence of the statute presents an insurmountable obstacle to the plaintiff's success. He had an agreement for a commission to be paid to him in case he effected a sale at \$85,000, and did not have any agreement in writing for payment of commission in case of sale at any other figure; and, his mandate being limited only as above stated, the price named, \$85,000, was a material factor and not merely a figure mentioned to serve as a basis for negotiations: *Weaver v. Dixon*, 62 O.L.R. 419.

The plaintiff's appeal should be dismissed and the judgment dismissing the action affirmed, both with costs.

Appeal dismissed.

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1930.

BAYLEY V. TRUSTS AND GUARANTEE CO. LTD.

Oct. 14.

Evidence—Action against Executors of Deceased Person for Commission on Exchange of Lands—Corroboration—Evidence Act, sec. 11—Agent Accepting Commission from both Parties to Contract—Disclosure to Deceased Party—Testimony of Agent—Whether Corroboration Necessary.

An agreement was made for an exchange of lands between C. and M., the defendants' testator, and contemporaneously therewith M. agreed to pay to the plaintiff a commission at the rate of 2 per cent. upon \$70,000, the value placed upon his land in the purchase agreement. An agreement was also made between the plaintiff and C. under which C. was to pay to the plaintiff \$600 as commission upon the sale of his land, which was given as part of the consideration for the transfer to him of M.'s land. M. paid the plaintiff \$250 on account of the commission payable, and this action was brought against M.'s executors to recover \$1,150, the balance. The only witnesses at the trial were the plaintiff and C. The plaintiff stated that 3 per cent. was the ordinary commission, but that he had agreed to accept a commission of \$600 from C., and had informed M. of that fact, and that in consideration of this it was agreed between

M. and himself that he should accept a reduced commission at the rate of 2 per cent., and that it was with full knowledge of the fact that M. signed the commission-agreement. C. stated that he had agreed to pay \$600 commission and had paid \$500 on account:—

Held, that, the evidence of the plaintiff having been fully accepted by the trial Judge, and there being no reason for disagreeing with his finding, the plaintiff's case was established, unless it was necessary that the testimony of the plaintiff that he had disclosed to M. the fact that he was receiving a double commission should be corroborated: Evidence Act, R.S.O. 1927, ch. 107, sec. 11.

And *held*, that, the making of the agreement being proved and corroborated by its production, the statute does not require corroboration of the disclosure.

Review of the authorities.

McGregor v. Curry (1914), 31 O.L.R. 261, followed.

Thompson v. Coulter (1903), 34 Can. S.C.R. 261, distinguished.

Judgment of WRIGHT, J. (1930), 65 O.L.R. 315, affirmed.

Per HODGINS, J.A.:—Section 11 of the Evidence Act has no real application to this case. The defence failed because the defendants adduced no evidence in support of it, and they cannot insist on corroborative evidence of the plaintiff's testimony on an issue raised by them but supported by no evidence. *Elgin v. Stubbs* (1928), 62 O.L.R. 128, explained.

AN appeal by the defendants from the judgment of WRIGHT, J. (1930), 65 O.L.R. 315.

September 15 and 16. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, JJ.A.

W. D. Roach, for the appellants, argued that the learned trial Judge erred in holding that it was not necessary that the evidence of the agent that he had notified both parties to the contract that he was receiving a commission from each of them should be corroborated. A double commission without notice disentitles the agent to any commission: *Peacock v. Crane* (1913), 29 O.L.R. 282. If a double commission was being paid, it is a presumption of law that the deceased would not know of it: *Culverwell v. Birney* (1887), 14 A.R. 266. The onus of proving notice to the appellants is on the plaintiff, who is in a fiduciary relationship to the defendants: *Thompson v. Coulter* (1903), 34 Can. S.C.R. 261. The appellants do not need to prove the secrecy of the commission. The onus is on the plaintiff to prove knowledge on the part of the deceased. This onus has not been discharged, because there is no corroboration of the plaintiff's evidence. *McGregor v. Curry* (1914), 31 O.L.R. 261, is to be distinguished as being based not on the necessity or otherwise of corroboration, but on the question whether or not the Statute of Limitations applied.

J. E. Zeron, for the plaintiff, respondent, relied on the reasons for judgment of the learned trial Judge and the cases there cited and referred also to *In re Hodgson* (1885), 31 Ch. D. 177.

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October 14. MIDDLETON, J.A.:—An appeal by the defendants from the judgment of Mr. Justice Wright at the trial of an action brought to recover a commission alleged to be payable by the late Eugene T. Mailloux, whose executors the defendants are, under an agreement bearing date the 13th July, 1929.

On the 13th July, 1929, an agreement was made for the exchange of lands between one Croll and the testator, and contemporaneously therewith the testator agreed to pay to the plaintiff a commission at the rate of 2 per cent. upon the sum of \$70,000, being the value placed upon his land in the purchase-agreement.

An agreement was also made between the plaintiff and Croll under which Croll was to pay to him the sum of \$600 as commission upon the sale of his land, which was given as part of the consideration for the transfer to him of the testator's land. The testator paid \$250 on account of the commission payable, and this action is to recover \$1,150, the balance.

In answer to the plaintiff's claim the defendants originally set up two defences: first, that the testator was not the sole owner of the lands, and that his wife was in fact a joint tenant thereof, and she was not a party to the agreement. In the second place, they denied that the plaintiff had obtained for the testator's lands a purchaser who was ready and willing to purchase the same. At the trial leave to amend was given, and a further defence was pleaded. It was then said "that without knowledge of the deceased Eugene T. Mailloux the plaintiff was in fact entitled to receive and did receive a commission from one David A. Croll, being the person whom the plaintiff alleges he procured as a purchaser for the property of the said Eugene T. Mailloux;" and by reason of this, it is said, the plaintiff is now precluded from claiming the commission sued for.

The only witnesses at the trial were the plaintiff and Mr. Croll. The plaintiff established his case by producing the written agreement signed by the testator for the payment of the commission claimed, and by producing the contract between the testator and Croll. The plaintiff stated that 3 per cent. was the ordinary commission upon a transaction such as that in question, but that he had agreed to accept a commission of \$600 from Mr. Croll, and that he had informed Mr. Mailloux of that fact, and that in consideration of this it was agreed between Mr. Mailloux and himself that he should accept a reduced commission at the rate of 2 per cent., \$1,400 in all, and that it was with full knowledge of the facts that the testator signed the commission-agreement filed.

Mr. Croll stated that he had agreed to pay \$600 commission and had paid \$500 on account.

The defence raised by the amendment is the only one that need be considered. The evidence of the plaintiff was fully accepted by the trial Judge, and there is no reason for disagreeing with his finding. The contention put forth is that the learned Judge "erred in accepting the uncorroborated evidence of the plaintiff that he had disclosed to the said Eugene T. Mailloux that he, the plaintiff, was in fact obtaining a double commission."

The rule of law is free from doubt and is very forcibly stated by Lord Hanworth, M.R., in *Fullwood v. Hurley*, [1928] 1 K.B. 498, at p. 502: "It cannot be stated too plainly that an agent must not accept commissions from both sides, that if there are two commissions that are to be received it must be on the basis of the actual work being done for both parties with the assent of both parties after full knowledge. If such knowledge is afforded and it is made plain what position the agent occupies, then it is possible for the agent to act between the parties, but if and so long as the agent is the agent of one party, he cannot engage to become the agent of another principal without the leave of the first principal with whom he has originally established his agency."

Upon the evidence which has been accepted by the learned trial Judge the plaintiff has shewn all that is necessary to entitle him to receive commission from both parties to this transaction.

Our inquiry is now limited to the question mainly argued, whether the evidence of the plaintiff has been adequately corroborated so that his recovery is not prevented by reason of the provisions of our statute.

In England there is no similar statutory requirement. In early cases it appears to have been laid down as a principle that, where a claim is made against an estate, the plaintiff ought not to be permitted to recover on the strength of his own evidence alone and that corroboration should be required. But in 1885 there were two decisions of the Court of Appeal which repudiate any such theory. I refer to *In re Garnett* (1885), 31 Ch. D. 1, and *In re Hodgson*, 31 Ch. D. 177. In the former, Brett, M.R., puts the situation with his usual force (p. 9): "There is no such law. Are we to be told that a person whom everybody in earth would believe, who is produced as a witness before the Judge, who gives his evidence in such a way that anybody would be perfectly senseless who did not believe him, whose evidence the Judge, in fact, believes to be absolutely true, is, according to the doctrine of the Courts of Equity, not to be believed by the Judge because he is not corroborated? The proposition seems unreasonable the moment it is stated. There is no such law The evidence ought to be looked at with great care; the evidence ought to be

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thoroughly sifted, and the mind of any Judge who hears it ought to be, first of all, in a state of suspicion; but if in the end the truthfulness of the witnesses is made perfectly clear and apparent, and the tribunal which has to act on this evidence believes them, the suggested doctrine becomes absurd. And what is ridiculous and absurd never is, to my mind, to be adopted either in Law or in Equity."

In the second case Sir J. Hannen states independently a similar opinion (p. 183): "We are of opinion there is no rule of English law laying down such a proposition. The statement of a living man is not to be disbelieved because there is no corroboration, although in the necessary absence through death of one of the parties to the transaction, it is natural that in considering the statement of the survivor we should look for corroboration in support of it; but if the evidence given by the living man bring conviction to the tribunal which has to try the question, then there is no rule of law which prevents that conviction from being acted upon."

The situation is different in Ontario, as by the Evidence Act, R.S.O. 1927, ch. 107, sec. 11, in an action against an executor the plaintiff "shall not obtain a verdict, judgment, or decision, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence."

I have quoted the opinions of the English courts for the purpose of indicating that there is no principle that requires or justifies the carrying of our statutory provisions beyond that which is actually provided, and also for the purpose of indicating that the Court should always have present to its mind the danger of relying too implicitly upon the evidence of the living in establishing a claim against the dead. The proper judicial attitude in the first place towards the evidence of the living claimant ought to be one of suspicion, even when that evidence is corroborated within the meaning of the statute, and effect ought not to be given to it unless the effect of the entire evidence, including that which is relied upon as corroboration, is to remove all reasonable doubt from the judicial mind.

It is not required by the statute that the plaintiff's claim must be established by the evidence of two witnesses, or by evidence apart from that of the claimant, if there is apart from his evidence that which the statute regards as corroboration. The courts have more or less studiously refrained, and wisely so, from any attempt to define in exhaustive terms precisely what constitutes corroboration within the statute. In an appeal from New

Zealand, *The Minister of Stamps v. Townend*, [1909] A.C. 633, Lord Loreburn, L.C., delivering the judgment of the Judicial Committee with reference to a similar statute of New Zealand, said the statute was satisfied when, upon the evidence taken as a whole, "there is a substantial corroboration of the testimony given by the interested party." This "confirms the credit not only of the statements which are expressly supported, but of all statements made by the interested party."

In our own Courts the late Chief Justice Armour, in *Parker v. Parker* (1881), 32 U.C.C.P. 113, after carefully examining all the earlier authorities, thus states his view (pp. 128, 129): "If there is any evidence adduced corroborating the evidence of the interested party in support of his claim or defence in any material particular, it must be submitted to the jury as sufficient corroboration in point of law, the weight to be attached to it in point of fact being a matter for their consideration."

This principle was adopted in *Radford v. Macdonald* (1891), 18 A.R. 167, a case which has always been regarded as a leading authority upon this question. MacLennan, J.A., in that case states substantially the same thing in language that appears to me to throw light upon the problem: "'Corroborate' means to strengthen, to give additional strength to, to make more certain, and if the evidence helps the judicial mind appreciably to believe one or more of the material statements or facts deposed to by the party, then, I think, it is what is required by the statute. In such cases, the weight of evidence will vary, but its admissibility cannot depend upon its weight. In some cases it may be weak and in others strong, but the Legislature has not said that it must be strong, but merely that it must be sufficient to corroborate, that is, to strengthen, the evidence of the party."

It is also to be observed that what is required by the statute and by the cases which have been interpreted is that there should be corroboration of the material evidence of the party. The material evidence is not corroborated by mere corroboration of irrelevant and immaterial matters. It must be corroboration of the party's evidence in essential matters. On the other hand, I do not think that it is required that there should be corroboration of the evidence of the party with respect to that which perhaps is the vital and essential portion of his evidence in which he is in conflict with that which the executors are ready to admit. So to hold would be to impose an obligation upon the claimant far in excess of that which the statute requires.

This distinction is thoroughly appreciated and emphasised in the decision relied upon by the learned Judge below, in his very

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careful opinion, the case of *McGregor v. Curry*, 31 O.L.R. 261. There the action was brought for specific performance of an agreement made by the defendants' decedent to transfer stock to the plaintiff. In answer to this claim the defendants set up laches and delay on the part of the plaintiff. The plaintiff met this by his evidence of a conversation with the deceased which entirely explained the delay in the attempt to enforce the claim. This conversation was not corroborated. The agreement and the fact that it had not been performed were proved and corroborated, and it was argued that the plaintiff could not succeed because the vital and essential thing in the way the case was presented depended upon his uncorroborated evidence. Sir William Meredith pointed out that upon the main question, the making of the agreement, the plaintiff was fully corroborated, and "that the corroboration required by the statute is not corroboration of every material fact which is required to be proved in order to entitle the party to succeed, but only of such material facts as lead to the conclusion that the testimony of the party is true." It is quite immaterial whether the fact which lacks corroboration is an integral part of the plaintiff's case in chief, or a matter which properly arises in reply. My brother Hodgins arrives at the same conclusion in a very carefully considered judgment from which I forbear quoting.

Applying that law to this case, here the making of the agreement is proved and corroborated. These are essential facts and the case is brought within the statute, and the plaintiff's evidence as to the disclosure of that which is said to be essential to the validity of the contract establishes the validity if it is believed. The statute does not require this to be corroborated. The rules which I have quoted from the English cases justify the consideration of this evidence with, in the first place, a suspicious mind, but, viewing the evidence with all possible caution, I cannot see any reason why it should not be accepted. There is much in the story told which perhaps amounts not technically to corroboration; the fact that the commission charged is less than the ordinary rate, the fact of disclosure being made to the opposite party to the transaction and a special bargain being made with him, all go to shew the probability of full disclosure to the deceased, followed by the special bargain alleged with him and proved by the production of the writing.

Counsel for the executors seeks to narrow the case to the one question. Has the evidence as to disclosure been corroborated? If this were permitted, it would practically amount to requiring the case to be proved by independent evidence, something the statute does not contemplate. The writing produced signed by the

deceased is sufficient corroboration to take the case out of the operation of the statute.

It is suggested that this is in conflict with the decision of the Supreme Court in the case of *Thompson v. Coulter*, 34 Can. S.C.R. 261. The report in that case is exceedingly meagre. I have, however, read the case in the Court below, including the judgments in the Court of Appeal here. When irrelevant matter is eliminated in that case, the situation is very simple. The deceased gave to the defendant an order to receive money from a bank for him. Shortly after this he died. His executors sued to recover the money. The defendant said, "True I received the money, but I immediately took the money to the deceased and paid it to him." There was no corroboration whatever of this, it depended solely upon the defendant's own statement, and accordingly in the Supreme Court he failed. In the Court of Appeal and at the trial the opposite view had prevailed. It was thought that the fact that the deceased had lived for some weeks after giving the order to the bank to pay the money to the defendant, and had made no complaint of the defendant having failed to pay it over, amounted to corroboration, but this theory was not accepted by the ultimate court of appeal. Plainly the case has no application to that in hand. The statements of Killam, J., in the Supreme Court, in the course of his judgment (at pp. 263 and 264) are not in conflict with the views I have put forward: "Corroborating evidence need not be sufficient in itself to establish the case." "The direct testimony of a second witness is unnecessary; the corroboration may be afforded from circumstances." "There does not seem . . . to be any evidence which can properly be treated as corroborating the defendant on the only point on which the onus was upon him, that is as to the payment."

It is, moreover, of moment to keep in mind that the same Court had recently decided the case of *McDonald v. McDonald* (1903), 33 Can. S.C.R. 145, and had there laid down the principle that evidence "may be corroborated by circumstances of fair inferences from the facts proved. The evidence of an additional witness is not essential."

I have studied with great care the decisions of the Court of Appeal in England in *Rex v. Baskerville*, [1916] 2 K.B. 658, and *Thomas v. Jones*, [1921] 1 K.B. 22. The former was a decision with reference to the corroboration of an accomplice, the latter a decision with reference to the corroboration necessary under the Bastardy Acts. There are statements in the course of these cases which I do not think can be too literally applied to cases falling under our statute. There what is required by the statute and by

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 1930. It is said, for instance, that "statements which are equally con-
 BAYLEY sistent with the story of the appellant as with the story of the
 v. respondent cannot properly be accepted as corroborative evidence:"
 TRUSTS [1921] 1 K.B. at p. 33. Our statute does not require that the
 AND evidence of the claimant should be corroborated where it is in con-
 GUARANTEE flict with other evidence. That may properly be the effect of the
 Co. LTD. requirement in criminal and bastardy cases.
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This view of the law makes it unnecessary to enter into a discussion on that which was much debated upon at the hearing, whether any corroboration is necessary in this case, because it might be well argued that the onus was upon the defendants to establish that which they allege, that the commission taken was a secret commission taken without the knowledge of the deceased. If the onus is properly upon the defendants, of course the statute has no application.

The appeal should be dismissed with costs.

MULOCK, C.J.O., and MAGEE and GRANT, JJ.A., agreed with MIDDLETON, J.A.

HODGINS, J.A.:—Appeal by the executors of one Mailloux from the judgment of Wright, J., in favour of the plaintiff for \$1,150 as commission on the sale of land.

To my mind the Evidence Act, R.S.O. 1927, ch. 107, sec. 11, has no real application to this case.

The plaintiff sued the executors for his commission, evidenced by a written agreement. The defendants denied liability and set up (by leave of the learned Judge at the trial) that the plaintiff was not entitled to receive any commission on account of the alleged sale, "by reason of the fact that without knowledge of the said deceased . . . plaintiff was entitled to receive and did in fact receive a commission from one Croll . . . the person whom the plaintiff alleges he procured as a purchaser for the property of the said deceased, and the said Croll . . . having in fact paid the said commission to the plaintiff as the agent of him the said Croll in the same transaction in which the plaintiff is now claiming commission against the defendants herein."

The plaintiff gave evidence himself, and in his examination in chief was asked and replied that the deceased Mailloux had knowledge of the fact that he was receiving a commission from Croll (the sale being in fact an exchange of lands). He deposes that he was only to get 2 per cent. instead of 3 per cent. from Mailloux, on that very account, and the agreement is for 2 per cent. on \$70,000.

Counsel for the defendants cross-examined the plaintiff on this point, but only succeeded in causing him still further to emphasise his statements. The defendants then called Croll, and he proved that he had agreed to pay the plaintiff \$600 as commission, and that that amount was fixed on account of what the plaintiff was getting from Mailloux.

The issue, however, raised by the defendants, in their defence, was whether the plaintiff, who was entitled otherwise to his 2 per cent., had received, without the knowledge of Mailloux, a commission from Croll; in other words, a secret profit in breach of his duty.

Although the onus on that issue was upon the defendant who asserted it, the plaintiff, if he chose to anticipate, was entitled to give his own evidence in chief. He need not have done so. The defendants were also entitled to cross-examine him in order to establish their defence and in so doing to take the risk of destroying it. No other evidence was tendered, and at the end of the case the defendants had failed to establish the receipt of any secret profit such as they had alleged. The plaintiff does not need, on that issue, his own evidence to entitle him to a verdict, judgment or decision on his claim in this action. His demand was only for a commission of 2 per cent., and he proved it, and his evidence was duly corroborated and believed by the learned trial Judge.

The defendants' defence simply fails because they adduced no evidence in support of it, and they cannot insist on corroborative evidence of the plaintiff's testimony on an issue raised by them but supported by no evidence whatever. The defence might just as well set up the infancy of the plaintiff, that he was an alien enemy, or undischarged bankrupt, or that the contract was an illegal one, and then, if the plaintiff denied these allegations on oath, claim that he must corroborate them or fail in his action. *Elgin v. Stubbs* (1928), 62 O.L.R. 128, insists only on the corroborative evidence containing something essential to the plaintiff's recovery, and not evidence essential only to the defence set up, and not otherwise supported by any one.

I would dismiss the appeal with costs.

Appeal dismissed.

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RE HOME BANK OF CANADA.

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Banks and Banking—Insolvency of Bank—Winding-up—Transactions with other Banks on Day of Closing—Clearing House—Set-off—Effect of Appointment of Curator—Winding-up Act, R.S.C. 1927, ch. 213, secs. 19, 35, 73—Bank Act, R.S.C. 1927, ch. 12, secs. 117-123—Use in Litigation of Name of Company in Liquidation—Transfer of Chose in Action.

The Bank of Hamilton was, during the week of the suspension of the Home Bank, acting as a clearing house for the banks in the City of Hamilton. On the 17th August, 1923, the result of the clearings in Hamilton was in favour of the Home Bank to the amount of \$9,370.97, and sums totalling that amount were duly paid over to the Bank of Hamilton (as the clearing bank) by the various banks in Hamilton who were found to be indebted to the Home Bank at the close of the day. A settlement-draft for that amount was duly forwarded by the clearing bank to the Home Bank at Toronto. On the day named, the Home Bank closed its doors, and at 3 p.m. the curator appointed under the authority of the Bank Act took charge of the funds of the bank. On the following day, the curator deposited the settlement-draft with the Bank of Hamilton in Toronto. At the date of suspension, the Home Bank was indebted to the Bank of Hamilton in a sum greater than the amount of the settlement-draft; and the Bank of Hamilton, upon the reference for the winding-up of the Home Bank, asserted a right to set off against the settlement-draft the amount of the Home Bank's indebtedness. The Master refused to make the set-off, on the ground that the claims were not mutual owing to the intervention of the curator and his custody of this asset:—

Held, upon appeal, that the curator was a mere bailiff, with powers of supervision for the protection of all parties interested in the assets of the bank; that this debt, due at 3 p.m. on the 17th August by the Bank of Hamilton to the Home Bank, remained the property of the latter, and all that the curator acquired was the custody of the draft evidencing the debt.

Sections 19, 35, and 73 of the Winding-up Act and secs. 117 to 123 of the Bank Act considered.

A company in liquidation retains its corporate powers, including the power to sue, although that power must be exercised through the liquidator under the authority of the Court.

Kent v. La Communauté des Sœurs de Charité de la Providence, [1903] A.C. 220, followed.

Wade v. Crane (1916), 35 O.L.R. 402, and *Crain v. Wade* (1917), 55 Can. S.C.R. 208, 37 D.L.R. 412, distinguished.

At 3 o'clock on the 17th August there were mutual debts existing between the Home Bank and the Bank of Hamilton; the right of set-off existed; and neither the appointment of the curator nor his deposit, in his own name as curator, of the draft, derogated from the right of set-off by the Bank of Hamilton.

2. K. and W. had an account in a branch (in Toronto) of the Bank of Hamilton, and on the 17th August they wished to transfer \$2,140.34 from this account to the O.K. company's account in the head office of the Home Bank (also in Toronto). The branch office on that day charged the account of K. and W. with this amount, and gave them a transfer-slip, which was an order from the branch office to the head office which could be passed through the clearing

house in the usual way. This slip was deposited in the Home Bank on the same day to the credit of the O.K. company, and the O.K. company's account was on that day credited with the amount. This slip was taken possession of by the curator at 3 p.m. on the 17th August, and was subsequently deposited by the curator to his own credit as curator in the head office of the Bank of Hamilton. In the winding-up the liquidator treated the deposit to the credit of the O.K. company as a credit made by the company on the 17th August, thereby increasing by that amount the claim of the company as a creditor of the Home Bank. The Bank of Hamilton did not pay the transfer-slip and did not recredit the account of K. and W.; and thus, although it had collected \$2,140.34, it had not given the customer credit, but had assumed to set it off against a general indebtedness of the Home Bank to it:—

Held, that, by a mutual agreement between K. and W., the O.K. company, the Bank of Hamilton, and the Home Bank, the debt due to K. and W. by the Bank of Hamilton was transferred to the O.K. company, and concurrently the Bank of Hamilton was directed to transfer the fund to the Home Bank; in this way a chose in action was transferred as such, and the transfer was acted upon by the O.K. company proving in the winding-up for this sum and receiving a dividend thereon.

The contract of transfer was on the 17th August executory, and on that day the Bank of Hamilton had not handed over to the Home Bank gold or its equivalent in satisfaction of its debt to K. and W.; but the appointment of the curator did not annul the contract of transfer; and the complete arrangement was carried into full effect by the O.K. company proving for this sum and by the allowance of its claim before any claim of set-off was made by the Bank of Hamilton; and that bank was not entitled to the set-off claimed.

AN appeal by the Canadian Bank of Commerce from the report of the Master of the Supreme Court of Ontario in respect of two items in question in the winding-up of the Home Bank of Canada.

October 13. The appeal was heard by MASTEN, J.A., in the Weekly Court, Toronto.

R. C. H. Cassels, K.C., and *H. C. Walker*, for the appellant bank.

M. H. Ludwig, K.C., for the liquidators of the Home Bank of Canada, respondents.

October 17. MASTEN, J.A.:—This is an appeal from two items of the report, dated the 7th January, 1927, made by Garrow, Master (now Mr. Justice Garrow), “whereby he found that the appellant was not entitled to recover from the liquidators of the Home Bank of Canada any part of the two sums of \$9,370.97 and \$2,140.34 in priority to other creditors of the Home Bank of Canada, and was not entitled to set off the said sums against the indebtedness of the Home Bank of Canada to the Bank of Hamilton, the predecessor of the above named appellant.”

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In my opinion the legal rights with regard to the items in question differ, and necessitate a somewhat extended statement of the facts regarding each.

With regard to the first item, \$9,370.97, I quote the clear and accurate statement found in the reasons for judgment of the learned Master:—

“The Bank of Hamilton (now the Canadian Bank of Commerce) claims to be entitled to set off against the indebtedness of the Home Bank to it at the date of the suspension of the former, the 17th August, 1923, a sum of \$9,370.97 which came into the hands of the Bank of Hamilton under the following circumstances:—

“In every city or town of importance in Canada the branches of the various banks operating there form themselves into a clearing house ‘for the concentrating at one place and at one time of the daily exchanges between the several members,’ and in the city of Hamilton it was the practice for each of the chartered banks to act in turn weekly as the clearing house for that district.

“The Bank of Hamilton (as it then was) was so acting during the week of the suspension of the Home Bank of Canada. On the 17th August, 1923, the result of the clearings in Hamilton on that date was in favour of the Home Bank to the extent of \$9,370.97, and sums totalling that amount were duly paid over to the Bank of Hamilton as the clearing bank for the week by the various banks in Hamilton who were found to be indebted to the Home Bank at the close of the day.

“A settlement-card or draft for this amount was duly forwarded by the Bank of Hamilton, as such clearing bank, to the Home Bank at Toronto. On the 17th August, 1923, the Home Bank closed its doors for the last time, and at three o’clock p.m. of that day the curator appointed under the authority of the Bank Act took charge of the funds of the bank. On the following day, the 18th, the curator deposited the settlement with the Bank of Hamilton at Toronto.

“At the date of suspension the Home Bank was indebted to the Bank of Hamilton in a sum greatly in excess of the amount of the settlement-draft, and the latter now insists upon setting off against such indebtedness the amount of the ‘settlement’ received from Hamilton and deposited by the curator on the 18th August to his credit as such.”

With respect to the second item of \$2,140.34, the statements of facts as submitted by the appellant and respondents respectively appear by exhibit 2, filed on the reference, and are as follows:—

“Kernahan and Walsh, of the O’Keefe Beverage Company, had

an account in the Bank of Hamilton, corner of Gould and Yonge-
streets, and on the 17th August they wished to transfer \$2,140.34
from this account to the O'Keefe account in the head office of the
Home Bank.

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"The Bank of Hamilton on the 17th August charged the account of Kernahan and Walsh with this amount; and, instead of giving them the cash to carry to the Home Bank, the Bank of Hamilton gave them a transfer-slip, which was an order from the Gould-street branch to the head office which could be passed through the clearing house in the usual way. This slip was deposited in the Home Bank on the 17th August to the credit of the O'Keefe company, and the O'Keefe company's account was on that date credited with the amount.

"The curator took possession of the cash in the possession of the Home Bank at 3 p.m. on the 17th August, including this transfer-slip, which was subsequently deposited by the curator to his own credit as curator in the head office of the Bank of Hamilton.

"The liquidators have, in winding up the bank, treated the deposit to the credit of the O'Keefe company as a credit made by the O'Keefe company on the 17th August, thereby increasing by that amount the claim of the O'Keefe company as a creditor of the Home Bank.

"The Bank of Hamilton, although it did not pay the transfer-slip, has not reccredited the account of Kernahan and Walsh in the Bank of Hamilton, the result being that, although the Bank of Hamilton has collected \$2,140.34, it has not given the customer from whom the money was received any credit, but has used the money for an entirely different purpose than that for which it was received, namely, by setting it off against a general indebtedness of the Home Bank to the Bank of Hamilton.

The claim made by the Canadian Bank of Commerce, arising out of the Bank of Hamilton transaction, was set out by the claimant as follows:—

"Paragraph 2. This was not an isolated transaction but had been a weekly occurrence for years. Kernahan and Walsh did not ask for cash, but for a transfer of funds, it being no concern of theirs as to how the transfers were effected between the banks, and, in accordance with the usual practice, the Bank of Hamilton issued 'settlement post-cards,' which the Home Bank was satisfied to accept and which it passed through the clearing house after acting on them.

"In the present case the transfer was effected in the usual way, by post-card (No. 2155). The Home Bank placed the amount,

Masten, J.A. \$2,140.34, to the credit of its customer, and so far as Kernahan
1930. and Walsh, the Bank of Hamilton, the O'Keefe Beverage Company,
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"Paragraph 3. The Home Bank then held the obligation of the Bank of Hamilton which the Bank of Hamilton was bound to honour, subject to right of off-set, and which the curator presented for payment on the 18th August. The settlement was honoured and paid, the proceeds being placed to the credit of the curator, but 'without prejudice' to the bank's alleged rights of off-set.

"Paragraph 4. The entries were apparently complete between the Home Bank and the O'Keefe company before the liquidators came into the picture. What existed then was an obligation of the Bank of Hamilton to the Home Bank held as cash by the latter. From the moment the deposit was made by the Home Bank to the O'Keefe account, neither the O'Keefe company nor Kernahan and Walsh had any further interest in the transaction. The O'Keefe company is an ordinary creditor for whatever balance it had with the Home Bank.

"Paragraph 5. The Bank of Hamilton did pay the settlement-card, and allowed the curator to deposit the funds to his credit—without prejudice—it being understood that the funds would be so held until the Bank of Hamilton's right to set off had been determined by the Master."

Regarding this last item, a difference arises between the parties. The appellant bank claims that the payment of \$2,140.34 was made "without prejudice" to its right of set-off and recovery, and this is denied by the respondents.

The learned Master has held that when the Hamilton branch of the Bank of Hamilton (predecessor in title of the appellant), on the 17th August, forwarded to the Home Bank a draft on its head office for the sum in question, its functions as agent or trustee for other Hamilton banks ceased, and that thereupon the Bank of Hamilton became the individual debtor of the Home Bank for \$9,370.37. I agree with the Master's opinion upon that point, but I am unable to follow him where he says "that in the interval between suspension and winding-up the functions of the bank as *such had ceased*, and that there was no mutuality of debits and credits as between the sums deposited by the curator with the Bank of Hamilton and the sum owed by the Home Bank to the Bank of Hamilton."

Section 73 of the Winding-up Act, R.S.C. 1927, ch. 213, reads as follows:—

"The law of set-off, as administered by the courts, whether of law or equity, shall apply to all claims upon the estate of the company, and to all proceedings for the recovery of debts due or accruing due to the company at the commencement of the winding-up, in the same manner and to the same extent as if the business of the company was not being wound up under this Act."

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By the report here in appeal, the right of set-off was refused on the ground that the claims are not mutual owing to the intervention of the curator and his custody of this asset. A perusal of the sections of the Bank Act, R.S.C. 1927, ch. 12, relating to the appointment and powers of a curator (secs. 117 to 123) leads me to the conclusion that the curator was a mere bailiff with powers of supervision for the protection of all parties interested in the assets of the bank, but that this debt due at 3 p.m. on the 17th August by the Bank of Hamilton to the Home Bank remained the property of the Home Bank, and all that the curator acquired was the custody of the draft evidencing the debt. I am not referred to any case directly in point, but I am fortified in the view above expressed by the decisions respecting the powers of a liquidator under sec. 35 of the Winding-up Act, and the necessity of bringing, in the name of the company, any action to recover a debt.

In *Kent v. La Communauté des Sœurs de Charité de la Providence*, [1903] A.C. 220, the Privy Council determined that under the Canadian Winding-up Act, 1886, secs. 15 and 31 (now secs. 19 and 35), a company in liquidation retains its corporate powers, including the power to sue, although such power must be exercised through the liquidator under the authority of the Court. At p. 226, Lord Davey, delivering the judgment of the Board, says: "But their Lordships think that wherever the object of the action is to recover a debt, or to recover or protect property the title to which is in the company, the action should be brought in the name of the company."

Palmer's Company Law, 13th ed., p. 301, says, in discussing the powers of a liquidator: "The action will be in the company's name, even an application under section 32 to rectify the register of members ought not to be in the name of the liquidator;" citing *Ex p. Kintrea, In re Bank of Hindustan* (1869), L.R. 5 Ch. 95; *Cyclemakers Co-operative Supply Co. v. Sims*, [1903] 1 K.B. 477.

In *Wade v. Crane* (1916), 35 O.L.R. 402, the liquidator sued in his own name in detinue for the seizure by the defendant of certain brick, and the right of the liquidator so to frame his action without joining the company was approbated by Duff, J., in *S. C., sub nom. Crain v. Wade* (1917), 55 Can. S.C.R. 208, at pp. 214, 215, 37 D.L.R. 412, at pp. 416, 417. But in that case the action

Masten, J.A. was founded on an alleged wrongful interference with the possession of the liquidator, and for that reason was properly brought in his name alone.

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My conclusion is that at 3 o'clock on the 17th August there were mutual debts existing between the Home Bank and the Bank of Hamilton; that the right of set-off existed; that neither the appointment of the curator nor his deposit, in his own name as curator, of the draft for \$9,370.97, derogated from the right of set-off by the Bank of Hamilton; and that on this item the appeal should be allowed.

With respect to the item of \$2,140.34 the legal rights seem to me to be entirely different. Originally the Bank of Hamilton were debtors in respect of this sum, and Kernahan and Walsh were creditors. Then, by a mutual agreement between Kernahan and Walsh of the one part, the O'Keefe company of the second part, the Bank of Hamilton of the third part, and the Home Bank of the fourth part, the beneficial interest in this debt due to Kernahan and Walsh by the Bank of Hamilton was transferred to the O'Keefe company, and concurrently the Bank of Hamilton was directed to transfer the fund to the Home Bank. This transfer was effected in the usual way by post-card, and the sum was placed to the credit of the O'Keefe company in the books of the Home Bank. That is, a chose in action was transferred as such, and the transfer was subsequently acted on by the O'Keefe company, who proved in the winding-up for this sum and received a dividend thereon. It is true that the contract of transfer was on the 17th August executory, and on that date the Bank of Hamilton had not handed over to the Home Bank gold or legal tenders in satisfaction of its debt to Kernahan and Walsh; but the appointment of the curator did not annul the contract of transfer between the four parties as above indicated; and, as I understand it, the complete arrangement was carried into full effect by the O'Keefe company proving for this sum and by the allowance of its claim before any claim of set-off was put forward by the appellant.

In addition, it is argued for the respondent that this sum of \$2,140.34 has been paid by the appellant to the respondents in cash, and that, if the right to set-off originally existed, such money was paid under a mistake of law and cannot be recovered. The appellant claims, on the other hand, that the money was paid without prejudice to the right of set-off. If I am right in the view I have first put forward, this point becomes of no importance; but, if I am wrong, this item should be referred back to the Master to inquire and report whether the payment was or was not without prejudice to the right of set-off.

For the reasons I have just indicated, I would dismiss the *Masten, J.A.* appeal on this point.

Success being divided, there should be no order as to costs except that the costs of the liquidator should be costs in the winding-up.

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[WRIGHT, J.]

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Oct. 23.

Municipal Corporations—By-law of Township Corporation—Approval by Provincial Statute—Exclusive Franchise Granted to Company to Lay Pipes in Highways for Distribution of Gas—Licence Granted by Minister of Public Highways to another Company in Respect of Provincial Highway in Township—Invasion of Rights—Municipal Franchises Act, secs. 3 (1), 6 (a)—Action by Township Corporation to Restrain Second Company from Supplying Gas to Inhabitants of Township—Whether Action Maintainable—Highway Improvement Act, sec. 53—Injunction Operative until New By-law Passed by Township Council.

On the 20th February, 1929, the council of the plaintiff township passed a by-law, which was validated by an Ontario statute, 19 Geo. V. ch. 135, granting to the U.F.I. company an exclusive franchise to use the streets and public squares of a portion of the township for the laying of mains and pipes and the distribution and supply of gas by the company. The U.S.G. company, assignee of the U.F.I. company, pursuant to a clause in the by-law, duly executed a covenant to perform, observe, and comply with all the agreements, obligations, terms, and conditions contained in the by-law. The defendant company, on the 11th February, 1929, obtained, from the Minister of Public Works and Highways for the Province of Ontario, a licence or franchise to construct and operate a system of mains and pipes for the transmission or distribution of gas in, upon, and along a certain portion of provincial highway No. 2, lying within the limits of the plaintiff township. In the alleged exercise of the powers granted by this licence, the defendant company laid pipe-lines on or along the provincial highway, and constructed service-pipes leading from the main on the highway to residences on lands immediately abutting the highway on the north side, and to lands owned by C. on the south side of the highway, all within the township. C. had subdivided these lands, and branch-lines were laid to at least three houses on lands which did not abut upon the highway. These branch-lines were constructed by the defendant company, but at the cost of the owners of the properties served by them; meters were installed by the defendant company and remained its property, C. paying the company for the aggregate amount of gas shewn by these meters to have been supplied. This action was brought for an injunction and a mandatory order for the removal of the mains and pipes. Before the action was begun, the defendant company had supplied gas through these pipe-lines:—

Held, that the plaintiff corporation did not by its by-law grant an exclusive franchise to the U.F.I. company to supply gas to the inhabitants of the township, but only an exclusive franchise to enter upon all streets and public squares and to lay pipes, etc.

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At the date of the passing of the by-law the municipal council had no jurisdiction over provincial highway No. 2, for, by virtue of sec. 67 of the Highway Improvement Act, R.S.O. 1927, ch. 54, the control had passed to the Department of Public Highways, and it was within the powers of that Department to grant permission to lay a pipeline along that highway.

The effect of subsec. 1 of sec. 3 of the Municipal Franchises Act, R.S.O. 1927, ch. 240, is to provide that no individual, firm, or company shall acquire a right to supply the inhabitants of a municipality, or any of them, with gas unless and until a by-law setting forth the terms and conditions has been assented to by the municipal electors.

To bring sec. 6 (a) of that Act into operation, there must be a by-law of the township council granting the rights mentioned, and no such by-law was passed.

The licence granted by the Department conferred on the defendant company only the right to lay its pipes and mains upon the highway, and no additional rights or powers such as the municipal council might grant under sec. 6 of the Municipal Franchises Act.

Therefore the defendant company had no right or authority to supply gas to any of the inhabitants of the township unless and until a by-law had been passed under sec. 6 (a) or sec. 3 (1).

The Natural Gas Conservation Act, R.S.O. 1927, ch. 47, does not authorise the Minister of Mines to hear and determine such an issue as is raised in this action, and so does not oust the jurisdiction of the Court.

The plaintiff corporation is entitled to maintain this action in order to assert its rights under the Municipal Franchises Act.

City of Toronto v. Consumers' Gas Co. of Toronto (1927), 60 O.L.R. 336, distinguished.

London County Council v. South Metropolitan Gas Co., [1904] 2 Ch. 76, applied.

IN this action the plaintiff corporation claimed, *inter alia*: (1) a permanent injunction restraining the defendant company, its servants and agents, from committing any acts contrary to an Act respecting the United Fuel Investments Ltd. and certain municipalities in the County of Halton, 19 Geo. V. ch. 135 (Ontario); (2) a mandatory order directing the defendant company to remove all gas-mains, pipes, services and works, already installed contrary to the said Act, and to repair and replace all damage of any nature caused to the highways through the laying and removing of such pipes, services, works, etc.; (3) such further and other relief as may be necessary to preserve effectively the rights of the plaintiff corporation.

September 24. The action was tried before WRIGHT, J., without a jury, at Brantford.

E. H. Cleaver, K.C., for the plaintiff corporation.

Edmund Sweet, K.C., for the defendant company.

October 23. WRIGHT, J.:—The admitted facts in the case are as follows. On the 20th February, 1929, the plaintiff corporation

passed a by-law, No. 869, which was validated by the statute above mentioned. This by-law purported to enact as follows:—

(1) The consent, permission, and authority of the Corporation of the Township of Nelson are hereby given and an exclusive franchise for a period of 30 years from the 1st January, 1929, is hereby granted to United Fuel Investments Ltd., etc., to enter upon all streets and public squares and all lanes and other public places in all parts of concessions 2, 3, and 4 south of Dundas-street and in Brant's block, now or at any time hereafter within the jurisdiction of the council, to dig trenches and lay and bury therein and to maintain, operate, and repair mains and pipes of such sizes as the said company may require for the transportation and distribution and supply of gas in the said operation of the Township of Nelson for fuel and lighting purposes, together with the right to maintain, construct, and repair, under the surface of such streets and public squares and lanes and public places, all necessary regulators, valve kerb-boxes, safety appliances, and other appurtenances, that may be necessary in connection with the transportation and distribution and supply of gas.

Clause 17 of the by-law provides that the rights, powers, privileges and franchises, granted by it, shall not take effect and be binding upon the corporation unless, within 8 months after the final passing thereof, the company shall execute and deliver to the plaintiff corporation a covenant, duly executed by the company, to perform, observe, and comply with all the agreements, obligations, terms, and conditions contained in the by-law.

Pursuant to the provisions of the by-law, an agreement bearing date the 23rd August, 1929, was executed by the United Suburban Gas Company Ltd., assignee of the United Fuel Investments Ltd., whereby the United Suburban Gas Company Ltd., on its part, agreed to perform, observe, and comply with all the agreements, obligations, terms, and conditions contained in the said by-law No. 869.

The defendant company, on the 11th February, 1929, obtained, from the Minister of Public Works and Highways for the Province of Ontario, a licence or franchise agreement, granting to the company full power, authority, permission and consent to lay, construct, maintain, and operate a system of mains and pipes for the transmission or distribution of gas. such system to consist of a main transmission pipe-line or lines and all service-lines, connections and attachments necessary, convenient or incidental to the operation of the same, and through or by means of the said system to transmit and distribute gas in, upon, and along a certain portion of provincial highway No. 2. set out in the by-law, and lying within the limits of the Township of Nelson.

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In the alleged exercise of the powers granted by this licence, the defendant company laid certain pipe-lines on or along the said provincial highway. This company also constructed service-pipes leading from the main on the said highway, two of which were to residences on lands immediately abutting the said provincial highway on the north side. The third service-pipe led to lands owned by one Coleman, and lying on the south side of the said highway; these were all within the limits of the Township of Nelson. It appears that Coleman had subdivided these lands; and, while there was only one service-pipe to these lands, yet branch-lines were laid to at least three houses on lands which did not abut upon the highway.

These branch-lines were constructed by the defendant company, but at the cost and charge of the owners of the properties served by the same. In these houses meters were installed by the company and remain its property. It was also admitted that Coleman, the owner of the subdivision, pays the defendant company for the aggregate amount of gas shewn by these meters to have been supplied.

It was admitted that before this action was brought the defendant company had supplied gas through these pipe-lines.

At the trial, certain facts, material and necessary for the decision of the points in issue in this case were admitted by counsel for the respective parties.

For the plaintiff it is contended:—

(1) That under and by virtue of by-law No. 869 and the agreement made pursuant thereto, it granted an exclusive franchise to the United Fuel Investments Limited to supply gas to the inhabitants of the Township of Nelson, and consequently the defendant company has no right to encroach upon or invade such exclusive franchise.

(2) That in any case the defendant company has no right to supply gas to any of the inhabitants of Nelson Township, as no by-law granting such right has been passed by the municipal council, and consented to by the municipal electors, as required by subsec. 1 of sec. 3 of the Municipal Franchises Act, R.S.O. 1927, ch. 240.

(3) That no by-law such as contemplated by clause (a) of sec. 6 of the Municipal Franchises Act has been passed by the Municipal Council of the Township of Nelson.

For the defendant company it is contended that, by virtue of the licence granted to it by the Department of Highways, it is authorised and empowered to lay its pipe-lines on the provincial highway No. 2, and that, by virtue of the provisions of clause (a)

of sec. 6 of the Municipal Franchises Act, it has a right to supply gas to persons whose land abuts on the said provincial highway.

The defendant company also contends that the plaintiff corporation has no *locus standi* to maintain this action, on the ground that no such right is conferred by statute, and consequently the action could only be brought by the Attorney-General for Ontario, as representing the public interested in the issues.

I shall deal first with the contention that the plaintiff has granted an exclusive franchise to the United Fuel Investments Limited to supply gas to the inhabitants of the Township of Nelson.

By reference to clause 1 of by-law 869, it will appear that the franchise granted thereby is an exclusive franchise to enter upon all streets and public squares and to lay pipes, etc., but there is no language used in that clause which could be construed as granting an exclusive franchise to supply gas to the inhabitants of the township. Possibly the draughtsman considered that an exclusive franchise to lay pipes, etc., on the highways of the township would be sufficient for that purpose, but at the date of the passing of the by-law the municipal council had no jurisdiction over provincial highway No. 2, as, by virtue of sec. 67 of the Highway Improvement Act, R.S.O. 1927, ch. 54, such control had passed to the Department of Public Highways, and therefore it was within the powers of that Department to grant permission to lay a pipe-line along such highway—in fact it had the sole jurisdiction in the premises. It therefore would have been possible for persons residing along that highway to have gas supplied to them through the mains laid on such highway, had no other statutory provisions intervened.

The by-law purports to grant a monopoly, and therefore should be subject to strict construction: see Maxwell on the Interpretation of Statutes, 6th ed., p. 515. There are no apt words to create or grant an exclusive franchise to supply gas, so that the contentions of the plaintiff, so far as based on that ground, must fail.

Turning now to consideration of the plaintiff's second contention, it becomes at once apparent that it involves the construction of subsec. 1 of sec. 3 and clause (a) of sec. 6 of the Municipal Franchises Act, R.S.O. 1927, ch. 240, and it also involves the contentions put forward by the defendant company, thus it is really the crux of the whole case.

The two clauses mentioned were amended by 19 Geo. V. ch. 65, so as to make it clear that both manufactured and natural gas are included in their provisions. The effect of subsec. 1 of sec. 3 is clearly to provide that no individual, firm, or company shall

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the terms and conditions has been assented to by the municipal
electors, as provided by the Municipal Act.

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A reference to the procedure under the Municipal Act will shew that the municipal council must finally pass such a by-law after it has been assented to by the electors.

Therefore, in order for any corporation to acquire the right to supply gas, there must be, first, a by-law passed by the municipal council; second, the approval of such by-law by the municipal electors.

Section 5 of the Act, however, provides for certain exceptions to the requirements of subsec. 1 of sec. 3.

The problem to be solved here is, does the defendant company and its operations in Nelson township come within this exception or exemption? I think not. To bring clause (a) of sec. 6 into operation, there must be in the first instance a by-law of the township council granting the rights mentioned. Here it is admitted that no such by-law was passed. This is made clearer, if possible, by the concluding words of this clause, which contemplate the passing of a by-law by the council determining the limits of the territory which may be served by the transmission or trunk-line.

The whole purpose of this clause is manifestly to provide that, where the municipal council passes a by-law for the purpose mentioned therein, it is not necessary for its validity that the same should receive the assent of the electors, as required by subsec. 1 of sec. 3.

It will be observed that sec. 6 opens with the declaration that this Act shall not apply to a by-law granting the rights mentioned. It does not purport to enact or declare that any person whose land abuts on the transmission or trunk-line shall be entitled to be supplied with gas notwithstanding the provisions of subsec. 1 of sec. 3.

The situation here is further complicated by the provisions of the Highway Improvement Act, R.S.O. 1927, ch. 54. By virtue of this Act the highway in question is vested in his Majesty, and is under the control of the Department of Public Highways: see sec. 53.

The effect of sec. 67 has already been dealt with. It is presumably under this last section that the Minister of Highways granted the licence to the defendant company to construct its mains along or across highway No. 2, where it passes through Nelson township. This control is restricted to the highway proper, and does not extend to the adjoining lands, nor does the section in question

(67) purport to give the Department any power to define limits within which persons in the township of Nelson may be supplied with gas; nor does it, either in terms or by implication, restrict or affect the jurisdiction of the municipal council to pass by-laws except in respect of the control of the highway.

It must, therefore, be held that the licence granted by the Department only confers on the defendant company the right to lay its mains on the highway, and no additional rights or powers such as the municipal council might grant under sec. 6 of the Municipal Franchises Act.

In view of the foregoing conclusions, it must follow that the defendant company has no right or authority to supply gas to any of the inhabitants of the Township of Nelson unless and until a by-law is passed under the provisions either of clause (a) of sec. 6 or subsec. 1 of sec. 3 of the Municipal Franchises Act.

At the trial counsel drew my attention to the provisions of the Natural Gas Conservation Act, R.S.O. 1927, ch. 47, and contended, though faintly, that the provisions of that Act ousted the jurisdiction of this Court to decide the matters in issue in this action. A perusal of that Act will disclose that it does not attempt to do more than regulate the production, supply, and distribution of natural gas, and does not empower or authorise the Minister of Mines to hear and determine any such issue as is raised in this action.

In the statement of defence the defendant company pleaded the provisions of secs. 20 and 21 of the Railway and Municipal Board Act, R.S.O. 1927, ch. 225, but no reference was made to the same by counsel for the defendant at the trial, and I therefore conclude that this defence or objection is abandoned. In any case it is manifest that the provisions of the sections mentioned have no bearing on the matters in dispute here.

The objection as to the right of the plaintiff corporation to maintain the action is a formidable one and has caused serious consideration, and I have had considerable difficulty in arriving at a decision in respect thereof.

The cases cited and relied on by the defendant's counsel, notably *City of Toronto v. Consumers' Gas Co. of Toronto* (1927), 60 O.L.R. 336, throw grave doubts upon the rights of a municipal corporation to maintain an action unless such right is conferred by statute. The position of the plaintiff in the case just cited is widely different from that of the plaintiff here. In the case cited, the Appellate Division held that the city corporation had no right, under the particular statutes involved in the matter, to maintain an action to enforce a contract alleged to be created by

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a private Act of Parliament. As pointed out by Mr. Justice Middleton, at p. 345, the statute gave no right to the plaintiff with respect to the matters in dispute. Mr. Justice Orde in his judgment points out that the city had no interest, proprietary or pecuniary, in the matter, and the action was really brought to enforce the contract alleged to be created by the statute on behalf of and for the benefit of the citizens, and this the city corporation had no right to do.

Here the situation has a marked difference.

The evident intention of the Legislature in enacting the Municipal Franchises Act was to vest in municipal corporations the absolute right to control the supply of gas to the inhabitants of a municipality by prohibiting any person from supplying gas without first having obtained such right under a by-law of the municipality, approved in certain cases by the electors.

The defendant company is supplying gas to certain of the inhabitants without any by-law, and is thus invading, and certainly denying, the rights of the municipal council.

Under these circumstances, surely the plaintiff corporation is entitled to maintain this action to assert its rights under the statute.

An invasion of a right appears to me to be tantamount to a trespass on property, and as such confers a cause of action on the party whose right has been invaded.

In my view, the facts in this case brings it within the principle of the decision of *London County Council v. South Metropolitan Gas Co.*, [1904] 1 Ch. 76. In that case the Court held that the effect of the relevant statute was to give control of the inspection of gas to the plaintiff corporation, and that a denial of such right or interference therewith by the defendant company afforded a cause of action to the plaintiff corporation without the necessity of having the Attorney-General made a party. The Court distinguished the cases in which it has been decided that, where it is sought to enforce a public right on behalf of the public or a certain section or class of it, the Attorney-General is the proper plaintiff, from the case under review where control of a right or franchise was given to a municipal body.

In my view, the principles of the decision in the case cited apply to the situation here and establish a right of action in the plaintiff corporation to maintain this action.

There will be judgment declaring that the defendant company has no right to supply gas to the inhabitants of the Township of Nelson, or any of them, under the existing conditions, and an order will go restraining the defendant company from so doing.

This injunction will be operative only until a by-law such as is contemplated by the Municipal Franchises Act is passed by the Municipal Council of the Township of Nelson, and the operation of it will be stayed for one month to enable the persons affected by it to make other arrangements.

The plaintiff will be entitled to its costs of the action.

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Company—Mortgage to Secure Bondholders—Class Action by Bondholder to Set aside Assignment of Prior Mortgage to another Bondholder—Whether Maintainable—Rule 75—Fiduciary Relationship—Assignment of Mortgage—Conveyance to Defendants under Power of Sale—Grantees Taking as Mortgagees only.

In 1926, the C. R. company executed a mortgage to a trust company to secure certain bonds issued by the mortgagor-company. The mortgage was a third mortgage covering factory premises owned by the mortgagor-company and used by it in its manufacturing operations. The plaintiff and the defendant J. B. were bondholders. The C. R. company became financially involved, and at a meeting of the bondholders in 1928 a committee of bondholders was appointed to deal with the trustee for the purpose of carrying out a scheme for re-organisation. The defendant J. B. was appointed one of the committee. Nothing was done to carry out the scheme, and it was practically abandoned. Before this meeting, the holders of the second mortgage had served notice of exercising the power of sale under the second mortgage, and the property was advertised to be sold by auction on the 28th March, 1928. On the day previous, the defendant J. B. entered into an agreement with the second mortgagees for the assignment by them to him of their mortgage, for which he was to pay \$7,600. The amount then due on this mortgage was \$8,400. The defendant J. B., on that date, paid, on account of his agreement, \$2,000, and the second mortgagees assigned their mortgage to the defendant T., as the nominee of J. B., and on the same day a deed under the power of sale was executed by T. to J. B. for the alleged consideration of \$7,600. The funds for the assignment were provided by J. B. This action was brought by the plaintiff, on behalf of himself and all other bondholders of the C. R. company, to set aside the assignment of mortgage and for other relief:—

Held, that there was no fiduciary relationship of J. B. to the other bondholders, and he was not precluded from taking an assignment of the second mortgage without disclosing the transaction to the other bondholders.

2. T. having taken the assignment as nominee of J. B., the position was the same as if J. B. had taken the assignment to himself and then purported to convey to himself under the power of sale; and the status of J. B. was that of a mortgagee and not an absolute owner. The conveyance from T. to his co-defendants should therefore be set aside, or there should be a declaration that they hold as mortgagees only.

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3. The plaintiff was entitled (under Rule 75) to maintain his action brought on behalf of all bondholders.

Dicta in *Preston v. Hilton* (1920), 48 O.L.R. 172, 179, adopted.

AN action by Downer, on behalf of himself and all other bondholders of Canadian Radiators Ltd., to set aside an assignment of a mortgage, for an accounting by the defendants of all moneys received by them in respect of the lands covered by the mortgage, or, in the alternative, for a declaration that the defendants John Boughner and Sarah Jane Boughner hold the lands as trustees for the bondholders.

The action was tried before WRIGHT, J., without a jury, at Brantford.

J. McL. Reycraft, for the plaintiff.

W. S. Brewster, K.C., for the defendants.

October 24. WRIGHT, J.:—The history of the different transactions involved in this action, as detailed in evidence or as admitted by counsel at the trial, is as follows:—

On the 15th January, 1926, Canadian Radiators Ltd. executed a mortgage to the Trusts and Guarantee Company Ltd. to secure certain bonds issued by the mortgagor-company. The mortgage covered certain factory premises in the city of Brantford, owned by the mortgagor-company and used by it in its manufacturing operations.

The mortgage in question was a third mortgage and was given to secure bonds to the extent of \$200. The plaintiff holds bonds to the extent of \$1,500, and the defendant Boughner is also a bondholder.

Canadian Radiators Ltd. became financially involved, and a meeting of the bondholders was held on the 9th May, 1928. At this meeting certain propositions were put forward looking to the re-organisation of the company and involving the postponement of the bond-mortgage to a new mortgage.

This meeting authorised the appointment of a committee of the bondholders to deal with the trustee for the purpose of carrying out the provisions of the scheme for re-organisation. The defendant Boughner was appointed as one of this committee.

Nothing was ever done to carry out the re-organisation scheme, and it was practically abandoned.

Prior to the holding of this meeting, the holders of the second mortgage, the Hamilton Gear and Machine Company, had served notice of exercising the power of sale under the second mortgage, and the property was advertised to be sold by public auction on the 28th March, 1928. On the day previous, that is the 27th March,

the defendant Boughner entered into an agreement with the Hamilton Gear and Machine Company whereby that company agreed to assign to him the mortgage for \$7,600. The amount then due on this mortgage was said to be \$8,450. The defendant Boughner on that date paid, on account of this agreement, the sum of \$2,000, and, pursuant to this agreement, the Hamilton Gear and Machine Company assigned the said mortgage to the defendant Trepanier by instrument dated the 28th May, 1928, and on the same day a deed under the power of sale was made by the defendant Trepanier to his co-defendants for the alleged consideration of \$7,600, being the amount agreed to be paid by the defendant Boughner to the Hamilton Gear and Machine Company for the assignment of the mortgage.

The evidence shewed that the assignment of the mortgage, though taken in the name of Trepanier, was so taken to him as the nominee of his co-defendant John Boughner, and it also appeared that Trepanier was acting as solicitor for Boughner in connection with the transaction. It appeared that the funds for the assignment were provided by the defendant John Boughner.

It was stated in evidence that subsequent to the conveyance more than one agreement had been made for the sale of the property, but the agreements had fallen through.

The plaintiff brings this action on behalf of himself and all other bondholders of Canadian Radiators Ltd. claiming the following relief, namely:—

1. To have the assignment of mortgage set aside;
2. An accounting by the defendants of all moneys received by them in respect of lands included in the mortgage;
3. In the alternative, a declaration that the defendants John Boughner and Sarah Jane Boughner hold the said lands as trustees for the bondholders of Canadian Radiators Ltd.; and
4. Such further relief as the nature of the case may require.

The main contention of the plaintiff's counsel at the trial was that the defendant Boughner, by virtue of his appointment as one of the committee to act on behalf of the bondholders in connection with the proposed scheme for re-organisation of the company, was in effect a trustee and as such was precluded from taking an assignment of the second mortgage from the Hamilton Gear and Machine Company Ltd. without disclosing the transaction to the other bondholders.

I do not think this contention is entitled to prevail. There was no fiduciary relationship of the defendant Boughner to the other bondholders, and he was not, in my view, precluded from

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As already stated, the defendant Trepanier took the assignment as the nominee of his co-defendant Boughner, and the position of the matter is precisely the same as if the latter had taken the assignment of the mortgage to himself and had then purported to execute a conveyance under the power of sale. In other words, it was the case of a mortgagee purchasing the property under his own mortgage, and the authorities establish that such a proceeding does not vest an absolute title in the mortgagee. See *National Bank of Australasia v. United Hand-in-Hand and Band of Hope Co.* (1879), 4 App. Cas. 391; *Ingalls v. McLaurin* (1886), 11 O.R. 380; *Faulds v. Harper* (1886), 11 Can. S.C.R. 639.

The effect of the transaction is, therefore, that the title of the defendant Boughner is that of a mortgagee and not of an absolute owner. The conveyance from the defendant Trepanier to his co-defendants should therefore be set aside, or there should be a declaration that the latter hold only as mortgagees.

This is on the assumption that the plaintiff is entitled to maintain the action. It was strenuously argued by the defendants' counsel that the plaintiff had no *locus standi* to maintain this action; that it should have been brought by the mortgagees, the Trusts and Guarantee Company Ltd., if at all.

There is much force in this argument, but a review of the authorities has convinced me that it is not entitled to prevail. By Rule 75 of the Rules of Practice it is provided that where there are numerous persons having the same interest one or more may sue or be sued on behalf of or for the benefit of all. The provisions of this Rule have several times been discussed both in our own courts and in the courts in England. The scope of the rule was considered in *Preston v. Hilton* (1920), 48 O.L.R. 172, where Mr. Justice Orde in discussing the general application of the Rule, at p. 179, says:—

“A class or representative action is permissible, speaking broadly, only in cases where all those whom the plaintiff claims to represent are in the same interest (by which is meant not merely a like or similar interest) as the plaintiff, such as, for example, an action to set aside a conveyance in fraud of creditors, where all the creditors share ratably in the successful result of the action, or an action on behalf of all the shareholders of a company, or of all the policy-holders in an insurance company, or of all the debenture-holders secured by the same mortgage trust deed, or of all the part-owners of a ship.”

It is true that, so far as relates to debenture-holders, these observations were not necessary for the decision of the case then before Mr. Justice Orde, but I agree with them and adopt them as correct expositions of the law.

The leading case as to the requirements necessary to enable the plaintiff to maintain a class action is *Duke of Bedford v. Ellis*, [1901] A.C. 1. At p. 8 of the report Lord Macnaghten summarises the law applicable in the following words: "Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent."

This case and the principles laid down therein were elaborated and amplified in *Markt & Co. Ltd. v. Knight Steamship Co. Ltd.*, [1910] 2 K.B. 1021. See particularly the judgment of Lord Justice Vaughan Williams at p. 1027.

My view is that these authorities establish the right of the plaintiff in the present instance to bring the action on behalf of all the bondholders of Canadian Radiators Ltd.

There is here a community of interest, a community of grievance, and the relief sought is in its nature beneficial to all the bondholders. If the conveyance is set aside, the bondholders, through their trustees, the Trusts and Guarantee Company Ltd., will be entitled to redeem; and, if the property is sold, the bondholders will share ratably in the proceeds.

In the result there will be judgment declaring that the conveyance from the defendant Trepanier to his co-defendants is invalid and should be set aside.

The plaintiff will be entitled to his costs of action.

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Oct. 29.

Negligence—Injury to Passenger in Motor-truck—Negligent Operation upon Highway by Servant of Owner—Express Prohibition against Taking Passengers—Disobedience—Caprice of Servant—Non-liability of Owner.

The defendant J., who was the servant of the defendant L., was driving his master's motor-truck upon a highway, upon the master's business, when he overtook the plaintiff and invited him to get into the truck. The plaintiff did so, and the truck proceeded upon its way. J. drove so recklessly and at such a speed that the plaintiff was injured. J. had been forbidden by L. to take a passenger on the truck:—

Held, that L. was not liable to the plaintiff for the negligence of J.

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The taking of the passenger was not within the scope of J.'s authority, and was not a mode of exercising the master's employment; and J. in taking the plaintiff on the truck was committing an unauthorised and wrongful act, not connected with the employment nor with the act which J. was authorised to do, but an independent act for which L. was not responsible.

The plaintiff was in the position of a trespasser, as to whom there is ordinarily no duty except to refrain from wilful or intentional wrong.

Review of the authorities.

Harris v. Perry & Co., [1903] 2 K.B. 219, and *Austin v. Great Western Railway Co.* (1867), L.R. 2 Q.B. 442, distinguished.

ACTION for damages for injuries sustained by the plaintiff while a passenger (gratuitous) upon a motor-truck owned by the defendant Leonard and driven by his servant, the defendant Johns, by reason, as the plaintiff alleged, of the negligence of Johns.

October 16. The action was tried by LOGIE, J., without a jury, at Hamilton.

C. W. R. Bowlby, for the plaintiff.

C. W. Bell, K.C., for the defendants.

October 29. LOGIE, J.:—On the 17th September, 1929, while sec. 41 of the Highway Traffic Act, as enacted by (1929) 19 Geo. V. ch. 68, sec. 9, was in force, the defendant Johns, a servant of the defendant Leonard, was driving a truck and trailer owned by the defendant Leonard, on his master's business, in a westerly direction on the Hamilton and Niagara Highway, loaded with heavy iron pipes. The pipes were chained together. When Johns arrived at Grimsby, the plaintiff, with some companions, was standing at the side of the highway and when Johns reached that point he stopped the truck, and after some conversation as to where the plaintiff was going, Johns said: "I am going to Hamilton, if you care to jump on, jump on, and I will take you to Hamilton." One of the plaintiff's companions got in the cab, and, as there was no room for the plaintiff in the cab, he and a companion were told that they would have to sit on the back. They sat on the pipes, facing forward, between the ends of the pipes and the back of the cab. The plaintiff asked "Is these pipes secure?" and Johns said, "Yes, sure they are." Johns drove the truck on towards Hamilton at a reckless rate of speed, and as he turned into Vanwagner's Beach Road he took the corner at such a speed and in such a negligent manner that the chain parted and the pipe upon which the plaintiff was sitting crushed his leg against the cab, whereby the plaintiff sustained serious damage.

It is trite law that a master is liable to third persons for his servant's tortious acts done in the course of his employment, or within the scope of his employment, and is liable for the negligence or other tortious conduct of his servant in doing the class of acts which he was ordered or authorised to do, and it matters not what were the instructions given to the servant as to the manner in which he ought to do his duty. It matters not that a servant has abused his authority or exceeded or deviated from his instructions. It is no defence in proceedings against a master that his servant has done improperly that which he was ordered to do properly, and it is immaterial, except so far as it helps to define the servant's duties, that he received precise instructions, or that he was directed to be careful, or, except in considering what the scope of the servant's employment was, whether he was prohibited from doing the act complained of. But prohibition is relevant in determining whether the wrongful act was or was not a mode of exercising that employment. The maxim "*respondeat superior*" would be nullified if an employer could escape liability by merely enjoining care or caution, or by forbidding any particular act: *Limpus v. General Omnibus Co.* (1862), 1 H. & C. 526, 539. Moreover, a master will be liable for a servant's acts if the servant does what he was ordered to do in a roundabout way, or if in carrying out his master's order he does incidentally something on his own behalf, but a master is not responsible for the acts of servants which are unconnected with and not incident to their service and which are not done in the course of their employment. As put by Salmond on the Law of Torts, 7th ed., p. 115:—

"On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment but has gone outside of it. He can no longer be said to be doing, although in a wrong and unauthorised way, what he was authorised to do; he is doing what he was not authorised to do at all."

Even an emergency does not give any implied authority to a servant to do that which was not in the course of his employment, although that servant is of opinion that he is acting in his master's interests: *Cox v. Midland Counties Railway Co.* (1849), 3 Ex. 268; *Houghton v. Pilkington*, [1912] 3 K.B. 308.

In the latter case the plaintiff, at the request of the servant of the defendant, got into the defendant's cart, which was then in charge of a servant, in order to render assistance to another servant of the defendant who had been rendered unconscious by an

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accident. The plaintiff fell out of the cart and was injured through the negligence of the servant in charge of the cart in causing the horse to start, and it was held that the existence of an emergency gave no implied authority to the servant to invite the plaintiff into the cart, and that the defendant was not liable to the plaintiff. In that case, which followed *Cox v. Midland Counties Railway Co.*, Bray, J., said (pp. 310, 311):—

“In order to make the defendant liable to the plaintiff for the negligence of Heaps the plaintiff must prove, first, that the defendant owed her some duty, and, secondly, that there was a breach of that duty. The argument has been mainly directed to the question whether there was the duty owed by the defendant to the plaintiff that Heaps should exercise reasonable care as regards the plaintiff when she was in the cart. With regard to that the county court (trial) judge said in his judgment: ‘The plaintiff was something more in law than a volunteer; she was invited (or under the circumstances impliedly invited) into the defendant’s float by his servant, Heaps, at a moment which constituted an emergency. There was an obligation on the defendant’s servant to secure assistance on behalf of his master. The plaintiff was entitled to care on the part of the defendant’s servant, Heaps, and through breach of that care and duty she has suffered damage.’ Thus the county court judge bases the duty on this, that there was an obligation on the defendant’s servant in a case of emergency to procure assistance on behalf of the defendant. The question is, Did any duty in law arise from these circumstances? One must see whether Heaps had any authority to invite the plaintiff into the cart. If there was authority, how was it obtained? Heaps had no express authority from the defendant, and *it was not in the ordinary course of his duty, to invite people to get into the cart*, and therefore if he had authority at all it must be on the ground that the law implies such authority from the nature of the emergency which arose.”

The Court then went on to say that the *Houghton* case was governed by the decision in the *Cox* case, which shewed that the existence of an emergency did not confer upon the driver of the cart authority to invite the plaintiff into the cart, or to impose any duty on the defendant towards her. This case, of course, is a much stronger case than the case at bar, which is the case of an ordinary hitch-hiker who got on to the defendant Leonard’s truck owing to a mere caprice of the servant. The law was thus laid down by Willes, J., in *Bayley v. Manchester Sheffield and Lincolnshire Railway Co.* (1872), L.R. 7 C.P. 415, affirmed in the Exchequer Chamber (1873), L.R. 8 C.P. 148:—

"A person who puts another in his place to do a class of acts in his absence, necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trusts him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so intrusted either in the manner of doing such an act, or in doing such an act under circumstances in which it ought not to have been done: provided that what was done was done, not *from any caprice* of the servant, but in the course of the employment."

A master is not liable for the negligence of his servant while the latter is engaged in some act beyond the scope of his employment, for his own purpose, or at his mere caprice, though he may be using the instrument furnished by the master to perform his duties as servant. I have found no English or Canadian case exactly in point, but there are many American cases which recommend themselves to me. The driver of a motor-vehicle, sent on a particular mission by the owner of the machine, is, as a general proposition, acting beyond the scope of his authority when without the knowledge of his employer he invites another person to ride with him. If such passenger is injured through the mere negligence of the driver of the machine, the owner thereof will not be liable. The passenger is in the position of a trespasser, as to whom there is ordinarily no duty except to refrain from wilful or intentional wrong: Huddy on Automobiles, 5th ed., p. 831, sec. 638. See *Gruber v. Cater Transfer Co.*, L.R.A. 1917 F. 422 (Washington Supreme Court).

In the case at bar there was an express prohibition by the master to the servant to take a passenger on the truck, and this affords light on the scope of Johns' employment, and I hold accordingly that the taking of the passenger was not within the scope of the servant's authority, and was not a mode of exercising the master's employment, and that the servant in so taking the plaintiff on the truck was committing an unauthorised and wrongful act, and that that act was something which was not connected with the employment at all, or with the authorised act of transporting the pipes to Hamilton, but was an independent act, for which the master was not responsible.

It remains to dispose of the cases cited by Mr. Bowlby for the plaintiff.

In *Harris v. Perry & Co.*, [1903] 2 K.B. 219, the defendant, a contractor, engaged upon the construction of a "tube" railway, had forbidden his electric locomotive to be used save for the purpose of carrying material and had provided a platform for passage along the line on foot. The plaintiff, an engineer's inspector,

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engaged upon the same undertaking, at the invitation of the defendant's servant, rode on the locomotive "for his own convenience" and was injured by its collision with a truck. There was evidence that the defendant's representative knew of and permitted the use of the locomotive for carrying the defendant's workmen and others, and on these facts the defendant was held liable for the negligence of his servants.

Austin v. Great Western Railway Co. (1867), L.R. 2 Q.B. 442, is not in my opinion in point. It does not turn upon the scope of the servant's employment but upon the right of a passenger to be carried safely and the duty of the railway company so to carry him. Blackburn, J., at p. 445, cites the judgment in *Marshall v. York Newcastle and Berwick Railway Co.* (1851), 21 L.J. (C.P.) 34, and says:—

"The right which a passenger by railway has to be carried safely, does not depend on his having made a contract, but that the fact of his being a passenger casts a duty on the company to carry him safely."

This differs *toto coelo* from the case at bar.

The action therefore will be dismissed as against Leonard with costs. Judgment was entered at the trial against Johns for \$3,000 and costs.

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RE SECOND STANDARD ROYALTIES LTD.

Oct. 31.

Company—Proposed Arrangement Modifying Provisions of Charter—Approval by Shareholders—Application for Sanction Made before Judge of Supreme Court—Ontario Companies Act, R.S.O. 1927, ch. 218, sec. 64a. (18 Geo. V. ch. 32, sec. 7)—Abolition of Sinking Fund—Redemption of Preferred Shares—Status of Shareholders Objecting to Arrangement—Refusal of Judge to Sanction—Preservation of Rights of Minority—Costs of Objectors—Judges' Orders Enforcement Act, R.S.O. 1927, ch. 111, sec. 2.

An application by an incorporated company, under sec. 64a. of the Ontario Companies Act, as enacted by the amending Act 18 Geo. V. ch. 7, for an order sanctioning an arrangement affecting the rights of the shareholders of the company, was refused.

The purpose of the proposed arrangement was to modify some of the special provisions of the company's charter. The company had confined its business to the acquisition of "oil royalties," that is, royalties derived by the owners of land from the sale or exploitation of the oil found therein. The reason for the arrangement was that, owing to a common agreement among the producers of oil, the output was to be greatly reduced in future, thereby causing a great falling off in future revenues from royalties; and out of these reduced revenues the company would be unable to maintain its

preferred dividend payments of one per cent. per month and also maintain its sinking fund payments. A preliminary order of the Court directed the holding of a special general meeting of the shareholders to consider the ratification of by-laws of the directors and also directed the manner of giving notice of the meeting, and further that the application for sanction should come on to be heard upon the fifth day after the by-laws had been approved by resolution of the shareholders. By-law 10 of the directors, changing the conditions governing the sinking fund and the authorised preferred and common shares of the company, was, with certain amendments thereto, approved at the shareholders' meeting, as was also by-law 11, which, after reciting that the company's assets were of a wasting character, empowered the directors to declare and pay dividends notwithstanding that the capital of the company might thereby be impaired:—

Held, that, there being nothing in the Companies Act requiring that the preferred and common shareholders should meet and vote separately, and the votes of the two classes being taken separately, neither class was prejudiced by the fact that there was but one meeting.

Copies of by-laws 10 and 11, as passed by the directors, were sent to the shareholders with the notice of the meeting, and there was nothing in the notice or in the preliminary order or in the circular letter to the shareholders indicating the possibility of any amendment or modification of the proposed arrangement:—

Held, that, when a meeting is called for a special purpose set forth in the notice, any action of the shareholders in excess of the special purpose is invalid, but they may carry out part of the objects of the meeting and reject the rest.

That principle may be applied to proposals which affect the rights of the company as a whole, as between itself and some other person or corporation; but *aliter* when the proposals affect the rights of shareholders *inter se*. Any change in the substance of the proposals may benefit some at the expense of others; and, if that is even the possible result of an amendment of the by-law, it is not proper to permit it in the absence of a shareholder who had no notice of the amendment, and may be prejudicially affected by it.

According to the charter, all the preferred shareholders stood upon an equal footing—none was entitled to redemption before the others. By the proposed change, the sinking fund is abolished; and even the retention of the moneys now at the credit of the fund for the equal protection *pro tanto* of all the preferred shareholders disappears. Instead there is substituted a power to redeem any shares at any time for any sum less than 110 per cent. of the par value thereof, and that power is vested in the directors. There is no provision for deciding by lot what shares are to be redeemed, except when it is proposed to redeem at 110 per cent.:—

Held, that the proposed arrangement was so drastic in its destruction of the sinking fund and placed such absolute power in the hands of those who controlled the company to redeem whose stock they pleased, as to make it a violation of the rights of the minority; and for that reason approval of the arrangement should be refused.

Those who had brought actions against the company for the cancellation of their subscriptions for shares were not thereby debarred from objecting to the proposed arrangement. The company cannot be allowed to say that these objectors have no status as shareholders merely because they are seeking to establish that they are not shareholders—they are not attempting to approbate and reprobate at the same time.

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There is power to award costs under sec. 2 of the Judges' Orders Enforcement Act; and the objecting shareholders represented upon the application, as well as the trustee of the sinking fund, should get their costs from the company.

MOTION by the company under sec. 64a. of the Ontario Companies Act, R.S.O. 1927, ch. 218, as enacted in 1928 by 18 Geo. V. ch. 32, sec. 7, for an order sanctioning an arrangement affecting the rights of the shareholders of the company.

October 14 and 17. The motion was heard by ORDE, J.A., in Chambers.

R. S. Robertson, K.C., for the company.

A. C. McMaster, K.C., for the trustee of the sinking fund.

Shirley Denison, K.C., and *L. V. Sutton*, for *Osler Wade*, a shareholder.

J. P. MacGregor, K.C., for *I. H. Kent* and others, shareholders.

A. C. MacNaughton, for *J. M. C. Horn*, a shareholder.

October 31. ORDE, J.A.:—These proceedings are taken under the special provisions of sec. 64a. of the Ontario Companies Act, R.S.O. 1927, ch. 218, as passed in 1928 by 18 Geo. V. ch. 32, sec. 7, to sanction an arrangement affecting the rights of the shareholders of the company.

An order made by *Wright, J.*, on the 21st August, 1930, directed the holding of a special general meeting of the company's shareholders to consider the ratification of the by-laws of the directors embodying the proposed arrangement and the manner of giving notice of such meeting, and further that the application to sanction this arrangement should come on to be heard by a Judge sitting in Chambers upon the fifth day after the by-laws had been approved by the resolution of the shareholders.

The application to sanction the arrangement has now come on before me.

The company was incorporated on the 20th December, 1928, with an authorised capital of \$8,000,000, divided into 8,000,000 shares of \$1 each, of which 3,000,000 shares were to be preferred shares. Its purposes and objects were:—

“(a) To acquire, own, lease, prospect for, open, explore, develop, work, improve, maintain and manage mines and mineral lands and deposits, including oil and gas lands and deposits, and to dig for, raise, crush, wash, smelt, assay, analyse, reduce, amalgamate, refine, pipe, convey and otherwise treat ores, metals and minerals, including oil and gas, whether belonging to the company or not, and to render the same merchantable, and to sell or other-

wise dispose of the same or any part thereof or interest therein; Orde, J.A.

“(b) To take, acquire and hold as consideration for ores, metals or minerals, including oil and gas, sold or otherwise disposed of or for goods supplied, or for work done by contract or otherwise, shares, debentures or other securities of or in any other company having objects similar in whole or in part to those of the company, hereby incorporated, and to sell and otherwise dispose of the same; and

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“(c) Upon any issue of shares, debentures or other securities of the company to employ brokers, commission agents and underwriters, and to provide for the remuneration of such persons for their services by payment in cash or, with the approval of the shareholders as required by law or otherwise, by the issue of shares, debentures or other securities of the company or by the granting of options to take the same or in any other manner; and, subject to the provisions of Part VII. of the Companies Act, to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company;

“*Provided*, however, that the said commission shall not exceed 25 per centum of the amount realised therefrom.”

And it was by the charter further ordained and declared:—

“(1) The said preference shares herein provided for shall become and remain a lien upon the assets of the company superior to any claim or claims belonging to the ordinary or common shares or the holders thereof, and the holders of the said preference shares shall be entitled to a cumulative preferential payment at the rate of 12 per centum per annum, payable one per centum monthly upon the amount actually paid in on such shares, payable from profits if earned; and the said preference shares, both as to interest and as to distribution of the assets on the dissolution or winding-up of the company, shall have preference over the ordinary or common shares, which preference shall include any unpaid interest accrued, and an amount equivalent to interest at the said rate on the shares at the rate aforesaid from the end of the last period for which interest shall be due, down to the date of such dissolution or winding-up of the company; (2) For the better securing of the said preference shares and the payment of dividends thereon as hereinbefore set forth, the company shall establish a sinking fund and for that purpose shall on the first day of each month, beginning the first day of April, A.D. 1929, in each of the years 1929 to 1944, both inclusive, pay to the trustee, to be appointed

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by the directors of the company for that purpose, an amount not less than one-half of one per centum of the outstanding capital; (3) If at any time, from time to time hereafter, in the opinion of the trustee and a duly qualified actuary to be selected by the company and the trustee, the actual sum hereinbefore provided to be paid to the trustee for the purpose of providing a sinking fund for the payment of such preference shares shall be insufficient or more than sufficient to provide for the payment by the first day of April, A.D. 1944, of all the preference shares now or hereafter outstanding, then the said monthly sum herein provided to be paid to the trustee shall be increased or reduced to such monthly sum as the trustee, or the said actuary, shall consider to be necessary to provide for the whole of the preference shares for the time being outstanding being paid by means of the said sinking fund by the first day of April, A.D. 1944; (4) The trustee shall have the right from time to time to invest the moneys in the sinking fund in any investments authorised by law for investment of trust funds; (5) The whole of the preference shares which may then be outstanding may be redeemed by the company on the first day of April, A.D. 1944, or on any interest date thereafter, on payment of 110 per centum of the par value thereof and accrued interest, at any of the places where the principal thereof is by the terms thereof made payable, upon the company giving notice as hereinbefore mentioned; (6) After the payment to the holders of the preference shares of the interest as hereinbefore provided, they shall not be entitled to participate further in the profits of the company, and after payment of the amount required for the creating and maintaining of the said sinking fund, two-thirds of the balance of the net profits shall be applied by the directors of the company in the purchase of oil royalties in the discretion of the directors, and the holders of the ordinary or common shares of the company shall be entitled in any year or otherwise, as the directors of the company may direct, to a *pro ratâ* division of the remaining one-third of the net or surplus earnings of the company as a dividend upon their holdings of such ordinary or common shares; no dividends on common shares shall be paid prior to the first day of April, A.D. 1930; (7) The said preference shares shall not confer on the holders thereof, except as hereinafter mentioned, the right to vote, either in person or by proxy at any general meeting of the company, unless such meeting is convened for the winding-up of the company or for the purpose of considering any proposition to sell the undertaking of the company, or for approving a by-law authorising an application for supplementary letters patent to create any further issue of preference shares

or any issue of shares or other securities: *Provided*, however, that in the event of the interest on the said preference shares at any time being in arrears and remaining in arrears for six consecutive monthly periods the holders of the said preference shares shall have the right and be entitled to vote at any meeting of the shareholders of the company in common with the holders of the ordinary or common shares thereof, and such additional rights shall continue so long as the dividends on the said preference shares shall remain in arrears as herein mentioned; and (8) Notwithstanding anything hereinbefore mentioned, the company shall not authorise or create any other or additional preference shares ranking in priority to or *pari passu* with the preference shares hereby created, except the by-law authorising an application for supplementary letters patent for such purpose be approved, in addition to the approval required by the Companies Act, by the holders of at least 67 per centum in value of the preference shares of the company then outstanding, at a meeting specially called for the purpose, and the company shall not, without like consent and approval, authorise or issue any mortgage or other charge upon the assets of the company."

The proposed arrangement which I am asked to sanction seeks to modify some of the special provisions of the charter just quoted.

Of the total authorised capital, 2,833,300 preference shares and all the common shares, namely, 5,000,000, are issued and are fully paid up. Of this total issue, 1,500,000 preferred shares and 1,000,000 common shares were issued as fully paid up in exchange for the assets of an earlier company known as Standard Royalties Limited.

It is also stated in the annual report of the directors for the year 1929 that 200,000 common shares had been received back from the underwriters, "which, with the 800,000 common shares already held in trust by the directors," made "1,000,000 shares of common stock available to be used for the benefit of the shareholders." Just what this means is not quite clear. It is not treasury stock, as all the 5,000,000 common shares appear in the balance-sheet as fully paid. What value the company got for the million common shares, if any, is not disclosed. The question has no immediate bearing upon this application.

The company has apparently confined its business to the acquisition of what are called "oil royalties," that is, royalties derived by the owners of the land from the sale or exploitation of the oil found thereon. And, as I gather from the material before me, they all come from the South-western United States.

In the prospectus of the Mid-Continental Bond Corporation

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Ltd., which appears to have been the medium for the sale of the preference and common shares to the public, it is stated that "the company absolutely restricts its operations to the one purpose of investing in producing oil royalties; it cannot engage in any other branch of the oil industry or any other business whatsoever, and only producing oil royalties will be purchased."

The first of these statements was, no doubt, true. The second was not, as will be seen by reference to the objects of the company set forth in its charter which I have quoted above. In fact it is difficult, upon a fair interpretation of the company's objects, to find any power to invest in, or acquire, oil royalties at all. The primary object of the company was the acquisition of mines and of oil and gas lands, and the winning therefrom of metals, minerals, oil and gas and to dispose thereof. There is, of course, the provision in para. 6 of the special stipulations in the charter, quoted above, as to the investment of part of the surplus profits in the purchase of oil royalties. But it is probable that any shareholder, who had acquired his stock upon the faith of the charter alone, might have obtained an injunction to restrain the directors from investing any of the company's authorised capital in the purchase of oil royalties at all as being beyond the powers of the company. This is, again, all by the way, as it has no direct bearing upon the present application. But it tends to shew what an extraordinary organisation the company is.

During the year 1929, and for approximately the first half of 1930, the earnings of the company were large, and enabled the company to pay a dividend of one per cent. per month to the preferred shareholders, and also to pay into the sinking fund one-half of one per cent. upon the par value of the outstanding preference shares. I pause here to note that, while the president of the company says in his affidavit that the amount so paid in to the sinking fund was calculated upon the par value of the outstanding preference shares, and I assume he is correct in that, the express language of special para. 2 in the charter provides that the amount so paid in shall be "not less than one-half of one per centum of the outstanding capital," which would include the common stock as a basis for calculation. It is obvious that payments so calculated upon the whole outstanding capital would in 14 years greatly exceed the total of the authorised preference stock, to say nothing of the accumulated revenues derived from the sinking fund investments. There is, of course, the provision in para. 3 for reducing the payments, which could be used to check an undue augmentation of the fund, but there is the express language of para. 2, whatever may have been intended by its draftsman.

The reason for the proposed arrangement is set forth in the affidavit of the company's president upon which the order of Mr. Justice Wright was obtained, and also in the circular letter of the 25th August, 1930, which accompanied the notice to the shareholders of the special general meeting to consider the by-laws in question. The reason shortly was that, owing to a common agreement among the producers of oil, the output was to be very greatly reduced in future, thereby causing a great falling off in future revenues from royalties. Out of these reduced revenues, the company would "be unable to maintain its preferred dividend payments of one per cent. a month and also maintain its sinking fund payments"—I quote from the president's affidavit—and the circular letter is to the same effect.

According to the report of the meeting, there were present in person or by proxy holders of 1,367,740 preference shares and of 2,084,280 common shares. Of these 1,276,293 preference shares voted to confirm the by-laws (with certain amendments to by-law No. 10) and 89,447 preferred shares voted against them. Of the common shares 1,986,590 were for and 77,690 were against. So that the requisite majorities required by the Act were for the by-laws, that of the preferred stock exceeding 93 per cent. of the total preferred stock represented, and that of the common stock exceeding 95 per cent. of the total common stock represented.

By-law No. 10 as adopted at the shareholders' meeting is as follows:—

"By-law Number 10
Second Standard Royalties Limited.
(No Personal Liability.)

"Whereas it is desirable to change the conditions governing the sinking fund, and the authorised preferred and common shares of the company,

"Now therefore be it enacted as follows:—

"1. That the charter of the company be amended by striking out the following provisions therein respecting preference shares, numbered as follows: (1), (2), (3), (4), (5), (6), and by substituting therefor as follows:—

"(1) The said preference shares herein provided for shall become and remain a lien upon the assets of the company superior to any claim or claims belonging to the ordinary or common shares or the holders thereof, and the holders of the said preference shares shall be entitled to a cumulative preferential payment at the rate of 12 per centum per annum, payable three per centum quarterly, upon the amount actually paid in on such shares, payable from profits earned; and the said preference shares, both

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as to dividends and as to distribution of the assets on the dissolution or winding-up of the company, shall have preference over the ordinary or common shares, which preference shall include any unpaid dividends accrued and an amount equivalent to interest at the said rate on the shares at the rate aforesaid from the end of the last period for which dividend shall be due down to the date of such dissolution or winding-up of the company.

“(2) After payment of dividends upon preferred shares from time to time outstanding as herein provided, the net balance of profits of the company shall be paid over as a fund to a trustee, to be appointed by the directors of the company, such fund to be available at the discretion of the directors at any time for either or any of the following purposes:—

“(a) For redemption or purchase for cancellation of any of the preferred shares from time to time outstanding;

“(b) For re-investment in oil royalties;

“(c) After an amount equivalent to 6 per centum per annum of the par value of the outstanding preferred shares of the company has been utilised or reserved annually out of such fund for the purposes set forth in subsections (a) and (b) of this section, for the payment of a dividend upon the common shares of the company; provided however that the amount to be applied in payment of such dividend shall not be in excess of one-third of the balance of earnings paid into such fund during the period ending upon the date of the declaration of such dividend, available after complying with the foregoing provision, and in any case shall not be payable out of the moneys mentioned in section (4) of this paragraph.

“(3) Provided that the directors may from time to time exercise any or all of the above alternatives.

“(4) Provided that the moneys now accumulated in trust, pursuant to the former sinking fund provisions of the charter, shall be forthwith paid over by the Imperial Trusts Company of Canada to a trustee, to be appointed, as part of the fund above created;

“(5) The company shall have the right from time to time, either directly or through agents, to purchase for cancellation any of the said preferred shares in the open market at the marketable price from holders willing to dispose of the same at any price under 110 per centum of the par value thereof, and in addition shall have the right and power at any time on any dividend date to redeem the whole or any part of the outstanding preferred shares of the company, without the consent of the holders thereof, upon payment of the sum of \$1.10 per share and accumulated

dividends thereon; redemption shall be made subject to such provisions and regulations as the directors from time to time determine, including the determination of the method of drawing by lot where a portion only of the preference shares of the company is to be redeemed.

"2. That the directors be and they are hereby authorised to apply for supplementary letters patent confirming this by-law.

"3. That this by-law shall be submitted for confirmation to the shareholders of the company at a special general meeting thereof to be called to consider the same.

"Enacted this 15th day of August, 1930."

As so adopted, the by-law embodied certain amendments of the by-law as passed by the directors and submitted to the meeting.

In para. (b) of subsec. 2 of sec. 1, the words "leases, or investments in the ordinary course of business" followed the word "royalties," but were struck out at the meeting.

Paragraph (c) of subsec. 2 was a complete recasting of the original para. (c), which read as follows:—

"(c) For the payment of a dividend upon the common shares of the company; provided, however, that the amount which may be applied to payment of a common stock dividend shall not exceed one-third of the amount of earnings paid into such fund during the period commencing with the date of the last dividend declared and ending upon the date of the declaration of such dividend, and in any case shall not be payable out of the moneys mentioned in section (4) of this paragraph."

The opposition to the proposed arrangement was based on many grounds, some of which it is not necessary to mention. Others I shall merely touch upon.

It was urged that the preferred and common shareholders should have met and voted separately. There is nothing in the Act requiring this to be done, though Mr. Justice Wright might have so ordered. Though there was but one meeting, the votes of the two classes of shareholders were taken separately, and there was really nothing before me to convince me that either class had been prejudiced by the mere fact that there was but one meeting.

It was further suggested that, as the common shareholders who had purchased their shares through the Mid-Continental Bond Corporation had not received the certificates for their shares but merely interim receipts from the Imperial Trusts Company, the transfer agent and registrar of the company (the common shares being subject to a pooling arrangement until the 31st December, 1931), such common shareholders had not been able to vote in respect of such shares at the meeting. There was really no evi-

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dence upon this point before me. It was not at all clear that the pooled shares were not registered in the names of the real holders thereof, and the mere non-issue of a certificate has no bearing upon the question of registration. The inference from the interim receipt is that the shares are in fact registered in the names of the real holders, and so they were either present or gave proxies. I think it will be found that their votes were recorded in respect of all their holdings.

A great deal was said as to the effect of some of the statements in the prospectus already mentioned, and it was argued that they were binding on the company and that the company ought not now to be allowed to alter its constitution in a way which would enable it to escape the obligations which, it was alleged, the terms of the prospectus imposed upon it. It was not established that the company was really responsible for the prospectus, though the relationship between the company and the bond corporation seems to have been sufficiently close to justify a strong suspicion that it was in reality a party to it. How far, upon an application of this kind, a company may be affected by statements in a prospectus, or by anything of a contractual or quasi-contractual nature outside of its charter or by-laws, might be a nice question, which may or may not be settled by authority, but which need not now be considered.

A more substantial objection was based upon the amendments made at the meeting to by-law No. 10 as passed by the directors. Copies of this by-law were sent to the shareholders with the notice, and there was nothing in the notice or in Mr. Justice Wright's order or in the circular letter to the shareholders indicating the possibility of any amendment or modification of the proposed arrangement.

It is of course a well-recognised principle that when a meeting is called for a special purpose which is set forth in the notice, any action of the shareholders in excess of the special purpose is invalid, but that they may carry out part of the objects of the meeting and reject the rest. In other words, they may keep within, but must not go beyond, the purposes for which the meeting was called. In no other way can the rights of absent shareholders be protected.

It is said in reply to this objection that the changes in the proposed arrangements do not infringe this principle, and are well within the purpose of the meeting. When the nature and effect of the proposed arrangement are considered in conjunction with the charter-rights of the shareholders, I find great difficulty in coming to any such conclusion. In fact, the circumstances are

such that it seems to me impossible to say what modifications would be within or in excess of what the directors were submitting to the meeting, and it is very doubtful if the principle I have mentioned can have any application at all.

It is usually a simple matter to apply the principle to proposals which affect the rights of the company as a whole, as between itself and some other person or corporation. For example, the directors desire to enter into an important contract and want the approval of the shareholders. A shareholder who gets notice of the proposal may be satisfied with it, and does not attend the meeting. He cannot complain of a modification of the proposal if it does not add to the company's burdens or obligations.

But it is quite a different thing when the proposals affect the rights of shareholders *inter se*. Any change in the substance of the proposals may possibly, and perhaps must necessarily, benefit some at the expense of others. If that is even the possible result of an amendment of the by-law, is it proper to permit it in the absence of a shareholder who had no notice of the amendment, and who may be prejudicially affected by it?

The two amendments to by-law 10 which are objected to are in my opinion such as those not present ought to have had an opportunity of considering. It was proposed that the net balance of profits should be available at the discretion of the directors "for re-investment in oil royalties, leases, or investments in the ordinary course of business." The amendment by which that power of re-investment was limited to oil royalties might well have been strenuously opposed by some of the absentees.

The other amendment, that to para. (c), was clearly in favour of the preferred shareholders. On its face it had the semblance of the restoration of the sinking fund by setting aside 6 per cent. per annum of the par value of the issued preference shares, for the possible redemption thereof, but absent shareholders, both preferred and common, might be justified in saying to the directors, "If you are going to continue setting aside 6 per cent. per annum for this purpose after all, we would rather you continued it in the form of a sinking fund and not otherwise."

If I were driven to deal with this application upon the point as to whether or not the amendments were within the purposes of the meeting, I should consider the question so doubtful as to warrant my refusing the application. But I prefer to base my judgment upon what is really the substance of the proposed alteration in the charter-rights of the company's members. It is not enough that the proceedings shall have been regular and that the required majorities shall have decided in favour of the proposed

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course of action. If that were all, there would be no object in seeking the approval of a Judge. The Provincial Secretary could immediately issue the necessary supplementary letters patent. The Judge must pass upon the merits of the proposed arrangement.

It must be obvious, of course, that the statutory power given to the requisite majority to carry into effect some alteration of the rights of shareholders was intended to enable those in substantial control of a company to take such steps as they might deem necessary to continue the business, even though it meant a temporary or permanent sacrifice of some of the benefits to which they or some class of shareholders might be otherwise entitled by the company's charter. That power is not to be thwarted by the wilful opposition of a minority. The sacrifice is part of the price they pay for their personal immunity from liability to the company's creditors and for the other benefits accruing from corporate joint stock enterprise. And so schemes for the reduction in the rate of the fixed preferential dividend, or for wiping out arrears of unpaid dividends, or otherwise affecting the rights of a class of shareholders, which are designed to enable the company to continue business rather than be wound up, have been approved. The mere fact that the result of the scheme might improve the position of one class of shareholders at the expense of another class would not of itself be sufficient ground for withholding the sanction of the Court.

I think it must be a fundamental factor for consideration in all such schemes or arrangements that the proposed sacrifice or other modification of charter-rights must be borne proportionately by all those members of the class affected, so that a minority, while opposed, may at least feel that the majority are all giving up as much proportionately as they are. If the scheme may have the effect of enabling the majority, either directly or through the medium of the directors, whom the majority necessarily have it in their power to elect, to benefit some members of the class at the expense of others, then the scheme must be scrutinised with great care, and ought in most cases to be rejected.

The danger and impropriety of the proposed arrangement rest in what I have just said. By the charter, the company is required to pay a substantial sum monthly to a trustee to establish a sinking fund for the ultimate redemption of the preference shares. The moneys so paid in are to be invested in authorised trustee investments. Subject, perhaps, to the rights of creditors, the sinking fund becomes a fixed security for such redemption. And redemption, then made, must be of the whole outstanding preference shares.

From this it will be seen that all the preference shareholders stand upon an equal footing; none is entitled to redemption before the others; and it is probable that any attempt to redeem any without redeeming all would be restrained by injunction.

Now what is the effect of the proposed change? For the future the sinking fund is abolished. A new trustee is to be appointed by the directors, to whom the moneys now in the hands of the Imperial Trusts Company as trustee of the sinking fund, and amounting to more than \$231,000, are to be paid. After paying the 12 per cent. annual dividend to the preferred shareholders, all net profits are to be paid to this new trustee. While the intervention of this new trustee may constitute some check upon the destination of the moneys so paid in, the trustee will occupy rather the position of a banker than that of a trustee, as he must comply with the wishes of the directors, within the limits of the purposes defined in the by-law, as to the disposal of the fund. What are those purposes? The sinking fund as a security for the redemption of all the preferred shares upon an equal footing is destroyed. Even the retention of the moneys now at the credit of the fund for the equal protection *pro tanto* of all the preference shareholders disappears. Instead there is substituted a power to redeem any shares at any time for any sum less than 110 per centum of the par value thereof, and that power is vested in the directors. There is no provision for deciding by lot what shares are to be redeemed, except when it is proposed to redeem at the full premium of 10 per cent. That provision is of course wholly illusory if the directors should wish to favour any shareholders wanting to take advantage of the power to redeem, because redemption at 109.9 could be made without any drawing by lot.

Can one wonder that shareholders like Mr. Wade and others who have purchased shares should be alarmed at the possible effect of the proposal upon the value of their shares? If the scheme is sanctioned, the directors may proceed at once, out of the present sinking fund, and may continue out of future profits, to redeem the preference shares of those who may desire redemption and whom the directors may be willing to accommodate. If, as is always possible, the company should become insolvent, other preferred shareholders may suffer.

It is said that the directors ought to be relied upon to treat all the shareholders fairly in this regard. That may be true, but directors are chosen by the shareholders and must in the long run obey the commands of the majority. I am not overlooking the provision of the charter which confines the right to vote at ordinary general meetings of the company to the common shareholders,

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Orde, J.A. so that the preference shareholders as such have no voice in the management of the company. But I am likewise not oblivious to the fact that the company took over the assets of another company for which it paid 1,500,000 of preference shares and 800,000 of common, that the preferred and common shares were sold in units of one preferred and one common, and that upon this footing the control of the common stock is really in the hands of the promoters. What was the real cost to the shareholders of the old company of the shares they got in the new, as compared with the \$1 for each preferred and 25 cents for each common share paid by Mr. Wade, is not disclosed. But I think I am safe in assuming that the remaining outstanding common shares of the company are controlled by the promoters and that it is in their power to elect their own board of directors so long as they retain that control. What real chance has Mr. Wade, or others in the same position, of having his stock redeemed in these circumstances, unless those in control deem it in their own interest to do so?

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In this connection there is a further matter not to be overlooked. By-law No. 11, approved at the same meeting, after reciting that the assets of the company were of a wasting character, empowered the directors to declare and pay dividends notwithstanding that the capital of the company might thereby be impaired.

Mr. Robertson strenuously objected to any consideration being given to the objections of Wade and others who have begun actions against the company for the cancellation or rescission of their subscriptions for the shares they bought, upon the ground that they cannot at the same time seek to repudiate their subscriptions and come before the Court as shareholders. This strikes one at first blush as a forcible argument, but when examined it is fallacious. The same argument applies with equal force to the position of the company. It is applying to the Court for the approval of the scheme and seeks to have Wade and the other objectors bound as shareholders. The company can hardly be allowed to say at the same time that they have no status as shareholders, merely because they are seeking to have it established that they are not. It is the company that is seeking relief, on this motion, not the objectors, and they surely are not to be prejudiced because they see fit to fight the company on its own ground. Such a contest does not, so far as I can see, put those who are opposing the application in the position of one who attempts to approbate and reprobate at the same time.

One is naturally reluctant, in a case like this, to adopt a course which sets at naught what may be a carefully worked out, prudent

business scheme for safeguarding the future fortunes of the company. The proposals may in the long run work out for the benefit of all concerned. The refusal of the Court's sanction may result in the winding-up of the company unless a more equitable scheme can be evolved. But the proposed arrangement is so drastic in its destruction of the sinking fund and places such absolute power in the hands of those who control the company to redeem whose stock they please, as to make it a violation of the rights of the minority. The saying, *Fiat justitia ruat coelum*, is a trite one, but it is peculiarly applicable here. Whatever the consequences of my refusal may be, I must, acting judicially, do justice to the rights of the minority.

There will therefore be an order refusing to approve of the proposed arrangement.

As to costs Mr. Denison referred to *In re Parent Tyre Co.*, [1923] 2 Ch. 222, at p. 229, as authority for the principle that shareholders who appear and object ought not to be discouraged and ought to get their costs.

I have power to award costs under sec. 2 of the Judges' Orders Enforcement Act, R.S.O. 1927, ch. 111, and I think the objecting shareholders who were represented before me, as well as the trustee of the sinking fund, should get their costs from the company.

[IN BANKRUPTCY.]

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Bankruptcy—Landlord's Priority in Respect of Municipal Taxes—Proviso as to Rent and Taxes Becoming Due upon Bankruptcy of Tenant—Extent of Preferential Lien—Bankruptcy Act, R.S.C. 1927, ch. 11, sec. 126—Landlord and Tenant Act, R.S.O. 1927, ch. 190, sec. 37—"Execution of the Assignment"—Receiving Order.

In a lease of premises to a company which afterwards became bankrupt, the *reddendum* provided for an annual rental, but made no mention of taxes, and was followed by the usual short form covenant to pay rent and to pay taxes. There was also a proviso that in certain events, one of which was the lessee becoming bankrupt or insolvent under any bankruptcy Act, the then current month's rent, together with the rent for the three months next accruing and taxes for the current year, should immediately become due and payable and such taxes should be recoverable by the lessor in the same manner as the rent reserved. The landlord claimed, in the bankruptcy proceedings, the same priority in respect of the taxes as for the rent:—

Held, that, while a mere covenant to pay taxes is not a covenant to pay rent, the parties to a lease can stipulate that the taxes which

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the lessee covenants to pay shall be deemed to be rent and may be recovered in the same way; and the landlord has the same priority in respect of the unpaid taxes as he has in respect of rent fixed by the *reddendum*.
And *held*, having regard to sec. 126 of the Bankruptcy Act and sec. 37 of the Landlord and Tenant Act, that for the purpose of the landlord's preferential lien in respect of the taxes, the taxes must be deemed to be accruing from day to day for the period for which they are imposed, and must be apportioned accordingly, so that his priority must be confined to the three months' arrears immediately preceding and the three months immediately following the bankruptcy.

Tew v. Toronto Savings and Loan Co. (1898), 30 O.R. 76, followed.
The words "execution of the assignment," in sec. 37 of the Landlord and Tenant Act, must be deemed to include the making of a receiving order.

AN appeal by C. T. Roddy, the landlord of the premises which had been occupied by the debtor-company, from the disallowance by the authorised trustee in bankruptcy of the appellant's claim to a preference in respect of certain municipal taxes upon the demised premises.

October 14. The appeal was heard by ORDE, J.A., sitting in bankruptcy.

Dana H. Porter, for Roddy.

J. A. McEvoy, K.C., for the authorised trustee.

November 4. ORDE, J.A.:—The only question discussed before me was whether or not, under the terms of the lease, the taxes which the insolvent tenant covenanted to pay were to be treated as rent and could therefore be collected by distress.

The *reddendum* in the lease provides for an annual rental for the term in question of \$3,000, payable at the rate of \$250 monthly. It makes no mention of taxes.

This is followed by the usual short form covenant "to pay rent and to pay taxes," including local improvements.

There is also embodied in the lease a proviso that in certain events, such as seizure of the lessee's goods under an execution, or the execution by the lessee of a chattel mortgage or bill of sale, or his making an assignment for the benefit of creditors, or becoming bankrupt or insolvent under any bankruptcy Act, the then current month's rent, "together with the rent for the three months next accruing and taxes for the current year, shall immediately become due and payable, and the said term shall, at the option of the lessor, forthwith become forfeited and determined, and in every of the above cases such taxes shall be recoverable by the said lessor in the same manner as the rent hereby reserved."

The landlord claims, by virtue of the concluding words of this proviso, the same priority in respect of the taxes as for the rent mentioned in the reddendum. The trustee has disallowed the claim.

It has been decided that a mere covenant to pay taxes is not a covenant to pay rent: *Finch v. Gilray* (1889), 16 A.R. 484; *Boone v. Martin* (1920), 47 O.L.R. 205. But it has likewise been decided that the parties to a lease can stipulate that the taxes which the tenant covenants to pay shall be deemed to be rent and may be recovered in the same way that rent is recoverable: *Tew v. Toronto Savings and Loan Co.* (1898), 30 O.R. 76.

Upon the question as to the effect of the stipulation that, in the events mentioned, the taxes, which the tenant covenants to pay, shall be recoverable in the same way as rent, I can see nothing to distinguish the case from the *Tew* case, just cited. Upon the authority of that case I hold that the landlord is entitled to the same preference and priority in respect of the unpaid taxes as he has in the case of rent fixed by the reddendum.

The question then arises, whether or not the priority in respect of the taxes extends to the whole of the current year's taxes, which by the terms of the proviso the lessee agrees shall become due as rent upon his bankruptcy. I note that in the *Tew* case priority was given for the whole year's taxes. That case arose out of an assignment under the Assignments and Preferences Act as it then stood. This case arises under the Bankruptcy Act. By sec. 126 the preferential rights of the landlord depend upon the law of the particular Province in which the demised premises are situate. The law applicable here is set forth in sec. 37 of the Landlord and Tenant Act, R.S.O. 1927, ch. 190, which restricts the preferential lien of the landlord "to the arrears of rent due during the period of three months following the execution of the assignment." The section expressly refers to bankruptcy, and is clearly intended to apply to cases of bankruptcy as well as to voluntary assignments, though the words "execution of the assignment" are not quite apt when a receiving order is made. The words "execution of the assignment" must, having regard to the language of the section, be deemed to include the making of the receiving order, which by statute vests the bankrupt's property in the trustee.

Does this section entitle the landlord to a preference for the whole year's taxes, which by the terms of the proviso become immediately payable as rent? The question is not free from difficulty, and no authority other than the *Tew* case was cited upon this point. If the year's taxes are to be treated as rent, then I think that for that purpose they must be treated as having all the

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incidents of rent and as such to be accruing from day to day. The parallel is not quite fair, because there is nothing to prevent a lessee from covenanting to pay a year's rent in advance. But it can hardly be, if, for example, a tenant becomes bankrupt on the 2nd January and the taxes for the whole year are due on the 1st January, as they are declared to be by sec. 309 of the Municipal Act, that the landlord is entitled to priority for the whole year's taxes.

In the absence of any authority to the contrary, I am of the opinion that, for the purposes of his preferential lien in respect of the taxes, the taxes must be deemed to be accruing from day to day for the period for which they are imposed, and must be apportioned accordingly, so that his priority must be confined, just as it would be in respect of his rent, to the three months' arrears immediately preceding and the three months immediately following the bankruptcy, and I so hold in the present case.

As to whether or not the landlord is entitled to rank as an ordinary creditor in respect of the taxes subsequent to the expiry of the latter three months' period, I say nothing. The point was not discussed, and there is not sufficient material before me to enable it to be determined.

It will be for the Registrar to work out the rights of the parties upon this judgment, and the matter will be referred to him for that purpose.

The landlord will get his costs of this motion from the trustee, who will be entitled to indemnify himself in respect thereof, and as to his own costs, out of the estate.

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Nov. 7.

Constitutional Law—Division Courts Act, R.S.O. 1927, ch. 95, sec. 19—Appointment of Deputy-Judge—Secs. 1(g) and 18—B.N.A. Act, secs. 92(14), 96—Extension of Jurisdiction of Division Courts since Confederation—Trial of Action—Power of Judge to Recall Witness.

Section 19 of the Division Courts Act, authorising "the Judge" to appoint a barrister to act as his deputy, is within the powers of the Ontario Legislature; and a Deputy-Judge so appointed has jurisdiction to try an action in the Division Court to which he is appointed. The Provincial Legislature has jurisdiction, by virtue of sec. 92(14) of the British North America Act, over the administration of justice in the Province; and, while the appointment of the Judges of certain named Courts is excluded by the assignment of this function to the

Governor-General (sec. 96), the appointment of Judges for the Division Courts is not so excluded; and it would be *ultra vires* of the Governor-General to appoint a Judge of a Division Court.

In no case does the appointee receive his authority to act as Division Court Judge from the Governor-General, but in every case by virtue of provincial legislation. See secs. 1 (g) and 18 of the Division Courts Act.

It was argued that, by reason of the increase in the jurisdiction of the Division Courts whereby they are now empowered to deal with matters which, at the time of the passing of the British North America Act, came within the jurisdiction of the County Courts, the Division Courts have in effect become County Courts, within the meaning of sec. 96, so that the power to appoint the Judges thereof is now vested in the Governor-General:—

Held, that merely increasing the jurisdiction of an inferior Court, without changing its constitution or character, does not make it a County Court within the meaning of sec. 96.

At the trial of an action, the Judge has the right to recall any witness and further examine him.

AN appeal by the defendant in an action in the Eighth Division Court of the County of York from the judgment of the Deputy-Judge awarding the plaintiff \$75 damages for breach of contract and directing the return of \$65 paid to the defendant in respect of the alteration and repair of a fur-coat.

The appeal was upon two grounds: (1) that the Deputy-Judge had at the trial improperly recalled two witnesses who had already given evidence and upon their testimony assessed the plaintiff's damages; and (2) that the Deputy-Judge, not having been appointed by the Governor-General, had no jurisdiction to try the action.

September 22. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

J. R. Cartwright, for the appellant, argued the first ground; but the Court, without calling on *B. V. Elliott*, who appeared for the plaintiff, respondent, dismissed the appeal as to that ground.

Cartwright, on the second ground, argued that sec. 19, subsec. 1, of the Division Courts Act, R.S.O. 1927, ch. 95, authorising a County Court Judge to appoint a barrister to act as his deputy, is an encroachment on the right of the Governor-General, under sec. 96 of the British North America Act, to appoint Judges of the Superior, County and District Courts. The Province has extended the jurisdiction of the Division Court to equal that of the County Courts at the time of Confederation. Therefore the Judges must be appointed by the Dominion. The jurisdiction having been extended, the Province loses its right to appoint the Judges. Reference to the Division Courts Act, C.S.U.C. 1859, ch. 19, sec. 54; County Courts Act, C.S.U.C.

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Edward Bayly, K.C., for the Attorney-General for Ontario, submitted that the question was settled by *Regina v. Coote* (1873), L.R. 4 P.C. 599, which decided that Quebec could confer on Fire Marshals what was undoubtedly County Court jurisdiction. He also relied on *In re Wilson v. McGuire*, *supra*. The general administration of justice is a power conferred on the Provinces with certain narrow exceptions: *Attorney-General for Canada v. Attorney-General for Ontario*, [1898] A.C. 247, at pp. 254, 255. The Province has express power to increase the jurisdiction of the Division Court. In order to give effect to the argument of the appellant he would have to shew that the Division Court as at present constituted has become a County Court within the meaning of the words in the British North America Act. This is obviously not so. The County Courts still remain. Reference to *Re Judges Act* (1922), 52 O.L.R. 105, at p. 108; *Regina v. Bennett* (1882), 1 O.R. 445; *Richardson v. Ransom* (1886), 10 O.R. 387; *Regina v. Bush* (1888), 15 O.R. 398; Clement's Canadian Constitution, 3rd ed., p. 508; *Re Munro and Downey* (1909), 19 O.L.R. 249; *Rimmer v. Hannon*, *supra*; British North America Act, sec. 92, subsec. 14, sec. 96.

November 7. RIDDELL, J.A.:—In the Eighth Division Court of the County of York, this action was brought to recover \$200 for an alleged breach of contract—the particular circumstances of the action not being material to the appeal.

Mr. R. M. Willes Chitty sat as Deputy-Judge, having been appointed under the provisions of the Division Courts Act, R.S.O. 1927, ch. 95, sec. 19, which reads thus:—

“19.—(1) The judge may appoint a barrister to act as his deputy, and the barrister so appointed shall have all the powers and privileges vested in and be subject to all the duties imposed by law upon the judge.

“(2) The judge shall forthwith send to the Provincial Secretary notice of the appointment, specifying the name and residence of the barrister so appointed and the cause of his appointment.

“(3) No such appointment shall be continued for more than

one month, and in case the Lieutenant-Governor in Council disapproves of the appointment, he may annul the same."

All the evidence offered by the parties being in, the learned Deputy-Judge found in favour of the plaintiff; but said that, as he had no evidence of damages, he could not determine the amount. Counsel for the defendant objected to any evidence being then received, but the Deputy-Judge recalled two witnesses who had given evidence, one on each side; one gave an estimate of \$150 and the other about \$3. The Deputy-Judge found the damages, \$75—neither party offered any other evidence, and neither counsel cross-examined.

The conduct of the Deputy-Judge was made one ground of appeal; the other is on constitutional grounds—the appellant contending that sec. 96 of the British North America Act made it imperative that the Judge to try this question must be appointed by the Governor-General.

We disposed of the first point on the hearing—it is quite clear that the trial Judge has the right to recall any witness and further examine him, however it may be (in a civil case) as to a witness who has not given evidence already. Taylor on Evidence, 11th ed. (1920), thus puts it, para. 1477: "The Judge has always a discretionary power, with which the court above is very unwilling to interfere, of recalling witnesses at any stage of the trial, and of putting such questions as the exigencies of justice require." In the present case it would have been a gross miscarriage of justice and an outrage on common sense for the trial Judge to have given judgment for nominal damages because evidence of the amount of damages had not been given, instead of having the true amount of damages established by evidence of witnesses in court, and just requiring to be called.

The other objection seemed to us untenable, but because of the importance of the constitutional point involved, we thought we should express our views and reasons in writing.

The British North America Act, sec. 96, provides: "The Governor-General shall appoint the Judges of Superior, District and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick." The argument is that what was meant was in effect that only Judges appointed by the Governor-General should have the power to try cases which were, at the time of Confederation, solely within the jurisdiction of "Superior, District and County Courts," and that, as the amount sued for in this action was admittedly at that time without the jurisdiction of the Division Courts, the Legislature of Ontario could not, by subsequent legislation increasing the juris-

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diction of the Division Court, give the power to any one other than one appointed by the Governor-General to try it.

It seems to me that this objection is based upon an entire misconception of the British North America Act in the section mentioned. It will be seen that there is no reference to jurisdiction at all—the Courts are mentioned by name and nothing is said as to the extent of their jurisdiction or as to the kind of cases they have to try. What were the Superior Courts and what the County Courts in what is now Ontario, at the time the British North America Act was passed, is well known. Reference may be had to the R.S.O. 1877 and the C.S.U.C. 1859. Suffice it to say that there were Superior Courts and there were also Courts with the statutory name of County Courts. It is quite beyond question that sec. 96 of the British North America Act refers to these Courts when it uses the names given to them by law. There were also Courts known in the statutes as Division Courts, to the judgeship of which the Governor-General was given no right to appoint. Under the British North America Act, sec. 92 (14), the Province is given jurisdiction over “The administration of justice in the Province, including the constitution, maintenance, and organisation of Provincial Courts, both of civil and of criminal jurisdiction. . . .” The appointment of the Judges of certain named Courts is excluded by the assignment of this function to the Governor-General; but the appointment of Judges to this kind of Court is not so excluded; and it would be *ultra vires* of the Governor-General to appoint a Judge of a Division Court.

The Division Courts Act, R.S.O. 1927, ch. 95, provides for the Judge to preside over the Division Court. He may be either (1) the Judge, (2) the Junior Judge, or (3) the Deputy-Judge, none being directly appointed by the Provincial authorities; but the former two become Judges of the Division Court by virtue of sec. 1 (g), upon becoming Judges of the County Court by the appointment of the Governor-General; while the third, the Deputy-Judge, becomes such Judge by appointment by the person, called in the statute “the judge.” In no case does the appointee receive his authority to act as Division Court Judge from the Governor-General, but in every case by virtue of provincial legislation. That the Province has power to give to existing Courts any jurisdiction it sees fit is elementary, and is in clear contemplation of the British North America Act, sec. 92 (14); it may, indeed, be sometimes a question whether the extension of jurisdiction might not make a Court, a “Superior” Court, but no such question arises here. Matters of much greater

importance can be tried in England by Courts which are not considered Superior Courts.

I can see nothing here to interfere with the power of the Province to extend the jurisdiction of the Division Courts as it has done; nothing that has brought the Division Courts trying such actions within the category of "Superior, District or County Courts," so as to give the Governor-General the right to appoint a Judge to try them.

I would dismiss the appeal with costs.

I have not thought it necessary to cite the somewhat numerous cases deciding not dissimilar points, the decision of this case following from what I conceive to be the plain meaning of the British North America Act; in some are to be found expressions favouring the present interpretation, and none is substantially adverse.

We have not in this case to consider such difficult questions as to the relative powers of Dominion and Province as were raised by legislation referred to in the Law Society's publication "The Courts of the Province of Upper Canada or Ontario," pp. 225, 226.

LATCHFORD, C.J., and FISHER, J.A., agreed with RIDDELL, J.A.

MASTEN, J.A.:—At the hearing the Court held that the appellant's contention that the trial Judge had no right to recall witnesses was invalid, and the only question then reserved was as to the status and authority of Mr. R. M. Willes Chitty, who at the trial presided as a Deputy-Judge appointed pursuant to the provisions of the Division Courts Act.

The appeal should, in my opinion, be dismissed.

The fundamental question is one of fact, namely, was the Court which tried this action in truth and in fact a Division Court? I think it was, and that the Legislature of Ontario had, under the British North America Act, sec. 92, head 14, jurisdiction both to prescribe and extend the limits of the jurisdiction of that Court, and to appoint either directly or indirectly the acting Judge who presided at the trial. The authority to exercise both these functions is conferred in sec. 92, head 14, by the words "administration of justice in the Province, including the constitution, maintenance, and organisation of Provincial Courts, both of civil and of criminal jurisdiction," and such authority is not limited by the words of sec. 96 of the British North America Act or otherwise.

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The extension of the jurisdiction of the Division Courts into the field which at Confederation was occupied by the County Courts does not convert a Division Court into a County Court. It still remains in truth and in fact a Division Court.

ORDE, J.A.:—The only point reserved for consideration is whether or not sec. 19 of the Division Courts Act, R.S.O. 1927, ch. 95, is *ultra vires* of the Ontario Legislature.

It is quite clear that the Division Courts, as they existed at Confederation, were not Superior or District or County Courts, within the meaning of sec. 96 of the British North America Act. They were inferior Courts, and the power to constitute them and to appoint the Judges thereof necessarily rests with the Province under para. 14 of sec. 92 of that Act.

It happens in this Province that the Judges of the Division Courts are the Judges of the County and District Courts, but they exercise that jurisdiction by virtue of the provisions of the Division Courts Act, and not by virtue of any express appointment as Division Court Judges by the Governor-General. Those provisions are to be found in sec. 1 (*g*), defining the word "judge," and in sec. 18. But there was nothing at Confederation to prevent the Province from providing for the appointment of other persons as Judges of the Division Courts had it seen fit to do so.

Mr. Cartwright did not attempt to controvert this, but he argued that, by reason of the increase in the jurisdiction of the Division Courts whereby they are now empowered to deal with matters which theretofore came within the jurisdiction of the County Courts, the Division Courts have in effect become County Courts, within the meaning of that term as used in sec. 96 of the British North America Act, so that the power to appoint the Judges thereof is now vested in the Governor-General. And that, if that is so, then the Legislature had no power to provide, as it does by sec. 19, for the appointment by the Division Court Judge of some barrister to act as his deputy.

This contention, if sound, means that the County Courts mentioned in sec. 96 are not to be confined to those which at Confederation were so designated, and which have both in constitution and in name continued from that day to this, but include an inferior Court whose jurisdiction has been enlarged and has thereby in that sense encroached upon part of the field occupied at Confederation by the County Courts.

Carried to its logical consequences that contention might invalidate any provincial legislation which has removed certain matters from the Courts and vested them in boards, such as the

Workmen's Compensation Board and the Railway and Municipal Board.

Whatever may be the limit of the provincial power so to re-organise the administration of justice in this Province, under sec. 91 of the British North America Act, as to affect the power to appoint Judges under sec. 96, I am of the opinion that merely increasing the jurisdiction of an inferior Court, without any other changes in its constitution or character, does not make it a County Court or District Court within the meaning of sec. 96.

The appeal must be dismissed with costs, including the costs of the Attorney-General.

Appeal dismissed.

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[APPELLATE DIVISION.]

RE SEXTON.

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Nov. 7.

Bankruptcy—Preferential Claim for Wages—Claimant Hired to Supply Truck and Personal Labour—Preference as to Claim for Services in Operating Truck—Independent Contractor as Regards Supply of Truck—Labourer or Workman—Compensation for Services—Bankruptcy Act, sec. 121(3).

In a bankruptcy, G. claimed priority for unpaid wages due to him by S., the bankrupt, who had employed G. as a truck-driver, supplying his own truck and oil and gas for it. He was employed to haul gravel and to do any other work with his truck which he was directed by S. to do, and was to be paid for his work at a fixed rate per hour:—

Held (RIDDELL, J.A., dissenting), that, while the contract of hiring was single, the obligations of G. involved two distinct elements—(1) a contract for the services of G. as a labourer or workman in operating the truck and (2) a contract for the supply and use of the truck in operating condition; and, so far as (1) was concerned, G. was entitled as a labourer or workman to compensation for his services, upon a *quantum meruit* basis, and to priority therefor over ordinary creditors, under sec. 121(3) of the Bankruptcy Act, R.S.C. 1927, ch. 11; but as to (2) G. was an independent contractor, and his claim did not fall within sec. 121(3).

Saunders v. City of Toronto (1899), 26 A.R. 265, distinguished.

Per RIDDELL, J.A.:—One claiming to be paid more than a ratable share of the bankrupt's assets must make his right reasonably clear—it was the ownership of the truck which caused the employment and which was the chief value of the claimant to the bankrupt.

AN appeal by the trustee in bankruptcy of the property of George Sexton from an order of RANEY, J., sitting in Bankruptcy, allowing an appeal by John G. Gillingham from an order of the Registrar in Bankruptcy, and allowing the preferred claim of Gillingham for wages, under sec. 121 of the Bankruptcy Act.

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October 10 and 20. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

I. C. Harries, for the appellant, argued that Gillingham was not entitled to a preferred claim under subsec. 3 of sec. 121 of the Bankruptcy Act, R.S.C. 1927, ch. 11. Gillingham was not a servant or workman of George Sexton within the meaning of this section. He was an independent contractor. He would have been useless to Sexton without the truck, and it was his truck. It was the truck that was being hired, rather than the applicant personally: *Consolidated Plate Glass Co. of Canada v. Caston* (1899), 29 Can. S.C.R. 624; *Heron v. Coleman* (1919), 46 O.L.R. 154; *Algoma Steel Corporation Ltd. v. Dubé* (1916), 53 Can. S.C.R. 481; *Balfour v. Bell Telephone Co. of Canada* (1915), 34 O.L.R. 149; *Re Eastern Ontario Milk Products Co. Ltd.* (1922), 52 O.L.R. 67; *Re Western Coal Co. Ltd.* (1913), 12 D.L.R. 401.

E. W. Rush and *M. H. Breuls*, for Gillingham, respondent, contended that he was a servant or workman within the meaning of the section, as shewn by the particulars of his employment set forth in his affidavit. The truck was merely his tool. Under the section the workman is entitled to compensation, and the word "compensation" is a much wider term than "wages." The section also says "in respect of services rendered"—not "service," but "services." Reference to *Van Geel v. Warington* (1928), 63 O.L.R. 143; *Re Parkin Elevator Co. Ltd., Dunsmoor's Claim* (1916), 37 O.L.R. 277; *In re Stockton* (1921), 2 C.B.R. 204; 12 Corpus Juris, pp. 230 and 231.

November 7. MASTEN, J.A.:—This is an appeal from the order of Raney, J. (sitting as Bankruptcy Judge), dated the 27th June, 1930, whereby it was ordered that the claimant Gillingham be allowed a preferred claim for wages for the sum of \$246.25. Gillingham asserts a preferential lien in his favour under sec. 121, subsec. 3, of the Bankruptcy Act, and the trustee disputes the right to any preference. The claim to a lien was disallowed by the trustee, and he was sustained in that view by the Registrar, whose conclusion was reversed by Raney, J., on appeal to him.

In his affidavit supporting the application, the respondent alleges that he was employed by George Sexton, the bankrupt, as a truck-driver, between the 15th and the 29th August, 1929, within three months of the date of the receiving order; that he was to be paid \$2.50 an hour and was to supply his truck and supply gas and oil for it; that he was under Sexton's orders at

all times and submitted throughout to his supervision and direction; that he was under the immediate charge and direction of the bankrupt or his foremen, and was in no sense a contractor; that he was employed to haul gravel, and that Sexton or his foreman would direct him where to obtain this gravel and where to deposit it, and that he was to do any other work with his truck that he was directed to do by Sexton or whoever was in charge; that he was entirely under the command of Sexton, both in the manner in which he did his work and when the work was to be done, and had no choice as to where he went or what he hauled, and was not at any time paid by the piece or paid by the job or paid by the ton; that never at any time was any one else driving his truck during the period referred to above, and that he was always on the job working.

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Section 121, subsec. 3, of the Bankruptcy Act establishes a priority for "all wages, salaries, commissions or compensation of any clerk, servant, travelling salesman, labourer or workman in respect of services rendered to the bankrupt or assignor during three months before the date of the receiving order or assignment."

In enacting this provision the Parliament of Canada appears to have widened the class to whom a preference had theretofore been accorded (under the Winding-up Act) by adding the terms "labourer and workman," by the use of the word "compensation" in addition to salary and wages, and by the use of the term "services rendered." I mention this change as indicating that the preference accorded by the Bankruptcy Act is to be liberally construed.

The question arising for determination on the present appeal seems to me to present little difficulty. While the contract in question is one and single, the obligation on the part of the claimant involves two distinct elements: first, a contract for the services of the claimant as a labourer in operating his truck; and, secondly, a contract for the supply and use of his truck in operating condition.

In the first aspect it is plain that the obligation of the respondent is one of service. He is employed to obey his master's orders and submit throughout to his supervision and direction, consequently he is entitled as a labourer to compensation and to the preference in respect of such compensation as provided in the statute. He cannot be deprived of his right to a preference for his work as a servant because he contracts for the use of his truck. As to the contract for the use of his truck, he is an independent contractor, and the rental for such use does not fall within the

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provisions of the statute. In my opinion, it is the duty of the Court to divide and apportion the compensation which, under the contract, he is entitled to receive, having regard to the views above expressed. If the parties cannot agree on the proportion of the claim in question which is properly ascribable to the wages of the claimant as the operator of the truck, the division should be determined by the Registrar in Bankruptcy after hearing the evidence adduced by the parties.

I would therefore declare that to the extent only to which the remuneration payable by the bankrupt consists of compensation to the respondent for his service as the operator of the truck, he is entitled to the preference provided by sec. 121, subsec. 3, of the Bankruptcy Act, but not for rental of the truck; and, unless the parties agree on the proper apportionment, the question is to be referred to the Registrar to ascertain the proper apportionment, having regard to the foregoing declaration.

The claimant asserted a preference for the whole sum of \$246.25; the trustee objected to any preference whatever. Success is divided, and I would direct that each party bear his own costs here and below. Costs of the trustee to be allowed out of the estate.

Since writing the above, my attention has been drawn to the case of *Saunders v. City of Toronto* (1899), 26 A.R. 265, where the defendant was sued for damages sustained by the plaintiff, who was injured by the negligence of one McGowan, a carter, and it was found as a fact that the relationship between McGowan and the defendant corporation was not that of master and servant.

For two reasons I think that case does not stand in the way of the conclusion at which I have arrived above. The question in the *Saunders* case was largely one of fact on the evidence adduced. On p. 273 Osler, J.A., says: "I agree that the question is one of fact. There is, as a learned text-writer has remarked, much confusion in the authorities and much depends on the exact conditions of the employment and the exact circumstances of the case."

I note also that on the evidence Moss, J.A., dissented.

But, secondly, the case at bar seems to me to be essentially different. It arises under the words of the Bankruptcy Act and raises a different question, namely, is the defendant a labourer and is he entitled to compensation for work done as a labourer?

On these grounds I would distinguish the *Saunders* case from that at present under consideration.

LATCHFORD, C.J.:—I agree.

ORDE, J.A.:—I agree with my brother Masten. Were it not for the word “compensation” in the section I should be doubtful, but the addition of that word entitles the Court to ascertain the value, as upon a *quantum meruit*, of the personal services rendered by the claimant as a labourer and workman, notwithstanding that his contract did not sever the remuneration for the use of the truck from that for his labour.

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FISHER, J.A.:—I agree with Masten, J.A.

RIDDELL, J.A.:—This is an appeal by the trustee of a bankrupt estate against the judgment of my learned brother Raney, holding that the respondent, Gillingham, was entitled to a preferential claim against the estate.

Bankruptcy is a pure creature of the statute, being wholly unknown to the Common Law; the object of bankruptcy legislation—so far as the present case is concerned—is to have the available assets of one who is unable to pay his debts in full applied to pay them as far as possible and as far as possible *pro ratâ*. Any one who claims to have the right to be paid more than a ratable share of the bankrupt’s assets must make such right reasonably clear. He must make it reasonably clear that he comes within the statute, and the Court has no concern with the hardship or otherwise of a particular case or the wisdom of a particular provision of the law.

In the present case, the claimant-respondent asserts a claim under the provisions of sec. 121 of the Bankruptcy Act, R.S.C. 1927, ch. 11. which gives a preference, *inter alia*, to “all wages, salaries, commissions or compensation of any clerk, servant, travelling salesman, labourer or workman in respect of services rendered to the bankrupt or assignor during three months before the date of the receiving order or assignment . . .” Of the classes mentioned, it is claimed that he may come under “servant,” “labourer,” or “workman.”

The facts alleged are set out specifically in the affidavit of the claimant; in claiming a preference, he was, as I have said, bound to make it reasonably clear that the facts entitled him to claim under the words of the statute; if there is any defect in such proof, the blame rests upon himself.

He swears: “I, John G. Gillingham, of the city of Toronto, in the county of York, truck-driver, make oath and say as follows: 1. That I am a creditor of George Sexton, the above named bankrupt, and I am appealing from the disallowance by the trustee of my claim of the sum of \$271.25 as a preferred creditor for

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wages, and I am content to rank as an unsecured creditor for the balance, which represents court costs of two actions brought. 2. That I was employed by George Sexton, the bankrupt, as a truck-driver between August 15th and August 29th, 1929, within three months of the date of the receiving order, at Huntsville, Ontario, and Midland, Ontario, where the bankrupt was working as a sub-contractor for the Brennan Paving Company Limited. 3. My arrangement with Sexton was that I was to be paid \$2.50 an hour and I was to supply my truck and supply gas and oil for it. 4. I was under Sexton's orders at all times, and I submitted throughout to his supervision and direction. I was under the immediate control and direction of the bankrupt, or his foreman, and I was in no sense a contractor. 5. I was employed to haul gravel. Sexton or his foreman would direct me where to obtain this gravel and where I was to deposit it. I was not to haul any specific number of loads a day, and I was to do any other work with my truck which I was directed to do by Sexton or whoever was in charge. 6. I was entirely under the command of Sexton, both in the manner in which I did my work and when the work was to be done. I had no choice as to where I went or what I hauled, and I was never at any time paid by the piece or paid by the job or paid by the ton. 7. Never at any time was any one else driving my truck during the period referred to above. I was always on the job working. 8. In the period referred to above, namely August 15th to August 29th, 1929, I was employed 108½ hours, under the circumstances set out in the preceding paragraphs, at \$2.50 per hour, and there is now owing to me the sum of \$271.25 in respect of these services."

From this it appears:—

- (1) That he owned a truck and was a truck-driver.
- (2) That he was hired to draw gravel with his truck.
- (3) That he might be required to do any other work with his truck.
- (4) That when he was thus working for the bankrupt, he was under the orders of the bankrupt or his foreman.
- (5) That when he was thus working for the bankrupt he was to receive \$2.50 per hour.
- (6) That he was to supply his truck with gas and oil.
- (7) That in 13 working days, he worked for the bankrupt 108½ hours, or on an average of 8¼ hours per day.
- (8) That the amount to which he claims to be entitled is over \$20.75 a day.

These facts are, to my mind, consistent with the position of an independent contractor rather than that of a servant, labourer or workman, and, consequently, the claimant has not established himself in such category. If it were necessary, as I think it is not, to decide in which position, that of servant, etc., or independent contractor, he has placed himself, in my opinion the position of contractor is much more consistent with all the facts. It seems to be quite plain that it was the ownership of the truck which caused the employment and was the chief value of the claimant to the bankrupt.

I would allow the appeal with costs throughout.

Appeal allowed in part (RIDDELL, J.A., dissenting).

[APPELLATE DIVISION.]

REX v. WILKES.

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Nov. 7.

REX v. ROBERTSON.

Criminal Law—Keeping Common Gaming House—"Automatic Slot Machine"—Criminal Code, secs. 226, 229—Evidence—Operation of Machine—No Chance of Loss.

Each of the accused had in his shop a machine known as an "automatic vendor or slot machine," and some of the persons who came to the shops operated these machines. The machine is operated by inserting a 5 cent piece in the slot and pulling a lever, whereupon a package of mints is emitted, a package identical with the package which the accused sell over the counter for 5 cents. On operating the machine, the customer may or may not receive, in addition to the package, one or more "slugs," which are small perforated brass tokens, having no commercial or exchangeable value. These tokens may be used to operate the machine, and when it is thus operated it shews on its face a printed legend said to be humorous:—

Held (LATCHFORD, C.J., dissenting), that, there being no possibility of loss by the player, and the opportunity of reading a legend being of no material value, the game was not a game of chance or a mixed game of chance and skill, within the meaning of sec. 226 of the Criminal Code; and the accused were wrongfully convicted of keeping common gaming houses, contrary to sec. 629.

Rex v. O'Meara (1915), 34 O.L.R. 467, and *Rex v. Arnold* (1927), 60 O.L.R. 582, distinguished.

Heydon's Case (1584), 2 Co. Rep. 11, and *Lockwood v. Cooper*, [1903] 2 K.B. 428, applied.

Per LATCHFORD, C.J.:—The element of chance introduced by the machines increased the sales and profits of the accused, and the amusement caused was a material gain, depending upon chance,

APPEALS by the three defendants from their convictions by the Senior Police Magistrate for the City of Toronto, under sec. 229 of the Criminal Code, for keeping common gaming houses.

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June 4. The three appeals were heard together by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

E. J. Murphy, K.C., and *J. Cowan*, for the appellants, argued that the "slot machines" kept by the appellants on their premises were not gaming devices but mere amusement contrivances. They were not kept for gain, but merely for the amusement of customers in the shops. There was no "rake-off" from the machines, nor was there any wagering or gaming in connection with them. The "slugs" which the machine threw out were of no intrinsic value, and did not become the property of the customer, but were merely lent to him to work the machine for amusement. Nothing in the way of goods, wares or merchandise was disposed of by chance. There was no game of chance, because there was no element of loss. The evidence rebutted the statutory presumption from the presence of the machine on the premises that the appellants were guilty of the offence charged. As the machine was not a gaming device, the premises which housed it could not be said to be a common gaming house within the definition in sec. 226 of the Criminal Code, and so the appellants could not be keepers under sec. 229. *Rex v. Arnold* (1927), 60 O.L.R. 582, was different, in that the slugs in that case could be exchanged for merchandise.

Edward Bayly, K.C., for the Crown, contended that the machine was a gaming device under sec. 986, subsec. 2, of the Code. The slugs were redeemable in amusement. They resembled the ticket for a show. The result of one or any number of operations of the machine was, as regarded the operator, a matter of uncertainty. Reference to *Rex v. Wolfe* (1928), 50 Can. Crim. Cas. 189; *Rex v. O'Meara* (1915), 34 O.L.R. 467. It followed that the rooms in which the machines were being operated were common gaming houses, and the appellants were guilty of the offence charged.

November 7. The judgment of the majority of the Court was (by direction of the Chief Justice*) delivered by MASTEN, J.A.:—These are three appeals from convictions made on the 15th April, 1930, by Emerson Coatsworth, Esquire, a Police Magistrate for the City of Toronto. The informations in the three cases are alike, as are the convictions. The appeals were argued together, and the questions for our determination are the same in each appeal.

* See sec. 1013, subsec. 5, of the Criminal Code.

The charge is that the accused "unlawfully did keep a certain disorderly house; that is to say, a common gaming-house."

The charge is laid under sec. 229 of the Criminal Code, which reads as follows:—

"Every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any . . . common gaming-house . . . as hereinbefore defined.

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"(2) Any one who appears, acts or behaves as master or mistress, or as the person having the care, government or management of any disorderly house, or as assisting in such care, government or management, shall be deemed to be the keeper thereof and shall be liable to be prosecuted and punished as such although in fact he or she is not the real owner or keeper thereof."

It is common ground that the defendants in each case are the keepers, if their premises are held to be disorderly houses.

A common gaming house is defined by sec. 226 to be:—

"(a) a house, room or place kept by any person for gain, to which persons resort for the purpose of playing at any game of chance, or at any mixed game of chance and skill; or

"(b) a house, room or place kept or used for playing therein at any game of chance, or any mixed game of chance and skill in which . . .

"(ii) the whole or any portion of the stakes or bets or other proceeds at or from such game is either directly or indirectly paid to the person keeping such house, room or place;

"(iii) any game is played the chances of which are not alike favourable to all players, including among the players the banker or other person by whom the game is managed, or against whom the game is managed, or against whom the other players stake. play or bet."

The facts and circumstances of all three cases are similar.

Hiscock runs a café or refreshment establishment for the supply of sandwiches, coffee, etc., to his patrons.

Wilkes keeps a shop where he sells cigars, stationery, confectionery, toys, and magazines.

Robertson runs a restaurant or refreshment parlour and sells confectionery and light lunches.

There is no suggestion by the Crown but that the businesses so conducted by the accused are *bonâ fide* and legitimate businesses and not a cover for anything unlawful. In each of these shops there was found a machine known as an "automatic vending or slot machine." and some of the people who came to the

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shops operated these machines. The machine had been in Robertson's place about two weeks; in Wilkes' for ten or twelve days, and in Hiscock's about a month. The machine is operated by inserting a 5 cent piece in the slot of the machine, and pulling a lever. Thereupon the interior mechanism of the machine is put in motion, and a package of mints is invariably emitted. The package of mints so emitted is identical with the package of mints which the accused sell over the counter for 5 cents. In operating the automatic vending machine, the customer may or may not receive, in addition to the package of mints, a bonus of one or more "slugs," being small perforated brass tokens. The operator may get no bonus of slugs or he may get any number up to 16 or possibly more. These slugs or tokens have no commercial or exchangeable value, and the machine has on its face a notice as follows:—

"Candy vendor. This machine is for the sole purpose of vending candies and confections. The tokens received from this vendor are of no cash or trade value but may be used to play this vendor for the customer's amusement only. No candies or confections vended for amusement tokens."

These tokens may be used to operate the machine, and when it is so operated with a token it shews across the rollers of the machine a printed legend more or less humorous for the amusement of the customer.

This feature, in my opinion, clearly distinguishes this case from *Rex v. O'Meara*, 34 O.L.R. 467, and from *Rex v. Arnold*, 60 O.L.R. 582. In *Rex v. O'Meara*, Magee, J.A., at p. 471, says:—

"There is no evidence as to the value of the gum (which in *Rex v. Stubbs* (1915), 31 W.L.R. 109, 567, was stated to be one cent); but, if there was no profit on supplying a package for 5 cents, then the amount of the prizes must have been supplied at a loss to those controlling the machine. If there was a profit, then the prizes were really contributed by the depositors. *In either case, there was a loss to counterbalance the winning—and both brought about by chance.*"

In the present case there was no possibility of loss by the customer. The value of the mints which he was certain to receive for his coin is proved to be 5 cents, the retail price of the same package on the counter, and so there is no possibility of loss, but he may as a bonus secure by means of slugs or tokens the privilege of reading certain legends, alleged to be amusing, as these appear in the face of the machine when operated with a slug.

When he puts up a coin he receives mints of the retail value of 5 cents and, if fortunate, a token or tokens. App. Div.
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When he puts up the token received he puts up something which has no material value and receives something of no material value, viz., the opportunity of reading a legend alleged to be amusing. REX
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The question of law for determination is, whether such a proceeding is "gaming," for the accused cannot be convicted of keeping a common gaming house unless "gaming" is there carried on.

Then what is the essence of "gaming?"

In *Lockwood v. Cooper*, [1903] 2 K.B. 428, the head-note reads as follows:—

"To constitute gaming the game played must be one which involves the element of wagering; each player must have a chance of losing as well as of winning.

"A number of persons hired a room in an hotel for the purpose of playing whist. They played for prizes, which were not subscribed for by the players, but were given by third persons:—

"*Held*, that the whist so played did not amount to gaming within the meaning of sec. 17 of the Licensing Act, 1872."

Section 17 of the Licensing Act, 1872. reads as follows:—

"If any licensed person suffers any gaming or any unlawful game to be carried on on his premises he shall be liable to a penalty."

At p. 431 Lord Alverstone, C.J., in giving the judgment of the Court of Criminal Appeals, says:—

"The question which the justices have asked is whether playing at whist, not for money but for prizes, those prizes being given by third persons, amounts to gaming within the meaning of sec. 17 of the Licensing Act, 1872. I am of opinion that it does not. To amount to gaming the game played must involve the element of wagering—that is to say, each of the players must have a chance of losing as well as of winning. To hold otherwise would be an unjustifiable straining of the Act."

The conviction was quashed.

That decision was referred to with approval in the Court of Appeal by the Master of the Rolls in *Ellesmere v. Wallace*, [1929] 2 Ch. 1, at p. 28.

I find in vol. 25 of the English and Empire Digest, at p. 422, references to the following cases to the like effect:—

"'Gaming' is playing at any game, sport, pastime, or exercise, lawful or unlawful, for money or any other valuable thing which is staked on the result of the game, i.e., which is to be lost or

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won according to the success or failure of the person who has staked.—*Ram Pratap Nemani v. R.* (1912), 1 I.L.R. 39 Cal. 968.

“Gaming” is defined as playing any game, whether lawful or unlawful, for money or money’s worth.—*Hayes v. Bourke* (1911), 30 N.Z.L.R. 599.”

Unless, therefore, the words of sec. 226 extend the meaning of the term “gaming” beyond the meaning given to it in these decisions, the accused cannot be convicted of keeping a common gaming house.

Under sec. 226 of the Criminal Code, it is an essential element of a common gaming house that it shall be kept or used *for playing therein at any game of chance or at any mixed game of chance and skill.*

I am unable to distinguish between “playing at a game of chance” and “gaming.” In playing at a game of chance there must be a chance on the part of the gamester to lose as well as to gain, and, as already pointed out, the chance of loss to the player was the basis of the decision in the *O’Meara* case.

As it appears to me, the object of our statute is not to prohibit the purchase of mints or other similar articles or to prohibit harmless amusement that costs nothing, or to prohibit playing for love, but rather to abolish the temptation and convenience which common gaming resorts afford to the inhabitants of the Commonwealth for injuring their fortunes by losing their money in gaming at such resorts.

Applying the rule in *Heydon’s Case* (1584), 2 Co. Rep. 11, I think the statute must be interpreted in the sense I have indicated; that the operation of the automatic vending machine in the manner here shewn is not playing at a game of chance within the meaning of the statute; that the accused, therefore, are not keepers of common gaming houses, because those who operate the machine have no chance to lose; that it is here established that no chance to lose exists; and that the convictions should be quashed.

LATCHFORD, C.J. (dissenting):—These appeals are from convictions made on the 15th April, 1930, by E. Coatsworth, Esquire, a Police Magistrate for the City of Toronto. The informations in the three cases are alike, as are the convictions. The evidence is virtually the same, and the questions arising on each appeal are identical. The three appeals were accordingly argued together.

Taking Sol. Wilkes’ appeal as typical of the other two, it appears that he was charged with, and convicted of, keeping at 1034 St. Clair-avenue west, in the city of Toronto, “a certain disorderly house, that is to say, a common gaming house, con-

trary to the Criminal Code." The number of the section alleged to be transgressed is not mentioned in the information, but in the conviction it is stated to be 229. This provides that every one is guilty of an indictable offence who keeps a disorderly house, that is, *inter alia*, a "common gaming house . . . as herein-before defined." A common gaming house, as defined by sec. 226, is a house, room or place kept by any person for gain to which persons resort for the purpose of playing at any game of chance . . . or, clause (b) (iii), "any game is played the chances of which are not alike favourable to all the players."

Automatic vending machines yielding a definite return for a particular coin are widely used and are becoming increasingly popular. Realising how addicted fallen humanity is to the gambling complex, ingenious persons have devised machines which, in addition to supplying some article of trivial value when compared with the coin necessarily inserted, expelled at times tokens of the same size as the coins used, but centrally perforated. The perforation prevented their use for the production of any merchandise, but they could be exchanged with the controller for the time being of the machine. Occasionally, perhaps frequently, no token accompanied the goods delivered. Then, if the desire to invoke the goddess of chance had not subsided, and the player had another coin left, that, too, was hopefully inserted in the maw of the machine. Such was the manner of operation of the apparatus considered in *Rex v. O'Meara*, 34 O.L.R. 467, and *Rex v. Arnold*, 60 O.L.R. 582.

The machines admitted by each appellant to have been played on his premises—on Robertson's by a crowd of boys attending a near-by high school—produced the same immediate results. A small packet of mints, supplied by one Mintz, was invariably ejected when a nickel coin was inserted and the lever pulled by the player; sometimes nothing else befell; again, tokens, varying in number, were emitted. The player had the certainty of getting mints for his money and the chance of obtaining few or many tokens or none. If any, he was not entitled to exchange the token or tokens for goods, as a player could in the *O'Meara* and *Arnold* cases. Notice to this effect appeared on the face of each machine. What he could do was to insert any token he received in the machine and on pulling the lever have disclosed to him—these machines were devised to minister to what is called the sterner sex—a legend more or less humorous predicting his future, as that he would marry a lady affected by strabismus, or one fathered by a gentleman with large flat feet, to wit, a policeman. Instead of bodily sustenance, the successful player was furnished with intellectual

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enjoyment and naturally laughed. Even though the alleged joke was against him, he would feel compelled to laugh if friends were present. The more tokens he had available and used the greater the hilarity. "Nothing but laughter," Mr. Murphy argues, was produced by the use of the tokens.

It seems to me that in this Mr. Murphy's psychology is at fault. Apart from the physical reaction induced by tickling, laughter is the effect of a mental cause—an operation of the human intellect. While an Australian bird and an African quadruped are known to have the epithet "laughing" commonly applied to them, man is the only animal that really laughs. That is because he is the only animal with intelligence, properly so-called, or the faculty of comparing, not mere sense impressions or sensitive memories, but thoughts, ideas; and it is this comparison of one incongruous idea, thought or concept with another which induces the mental enjoyment manifested by a laugh.

In the cases cited, only goods satisfying one or more of the senses were exchangeable for tokens. In the cases at bar amusing predictions—few or many, as chance determined—which affected the mind of the player, as well as his sense of sight, were sometimes procurable in varying numbers. In other words, mental pabulum might be obtainable instead of the merely physical.

Even if laughter be not promotive of good health, as it is often said to be, the normal man or woman is naturally desirous of whatever provokes a laugh; and it is to this universal want, and, as suggested earlier, the almost universal love of gaming, that such machines as those on the premises of the appellants are employed to minister. The mints may be had in any of the appellants' places of business at 5 cents a packet. Why, then, are machines of intricate and costly make installed to sell the same product? The answer plainly is that the element of chance which they introduce increases the sales and profits not only of the individual installing the machine and supplying the candy for it, but also of the person permitting it to be played on his property. There it is kept for a gain to each appellant amounting to 100 per cent. and there persons resort for the purpose of playing what is obviously a game of chance, with the chances not alike favourable to all the players. Half the proceeds at or from the game is directly or indirectly paid to the person keeping the shop or premises, which is therefore, according to the definition in sec. 226, a common gaming house whose keeper is punishable under sec. 229.

I think that the appeals should be dismissed.

Appeals allowed (LATCHFORD, C.J., dissenting).

[APPELLATE DIVISION.]

MORIN V. ANGER.

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Nov. 7.

Contract—Purchase of Share in Syndicate—Fraud—Action in Division Court for Balance of Purchase-price—Agreement to Repay if Purchaser Dissatisfied—Pleading—Jurisdiction of Division Court—Division Courts Act, R.S.O. 1927, ch. 95, sec. 63(1)—Inability of Purchaser to Return Thing Purchased—Judgment for Plaintiff for Balance of Price—Execution Stayed until Counterclaim Disposed of in another Court.

The plaintiff and H. were promoting a mining scheme through a syndicate, whose sole purpose was to form a joint stock company in which the members of the syndicate should be interested in proportion to their interests in the syndicate. They induced the defendant, an illiterate, by fraudulent representations as alleged, to buy a share or unit in the syndicate, giving him a writing whereby the plaintiff agreed to pay him back his money with interest "at any time he was not satisfied with the proposition." The price of the share was \$500, for which the defendant gave a promissory note, upon which he paid sums of money reducing the amount to \$190. The plaintiff sued in a Division Court for this sum and interest. The defendant disputed the claim, setting up the terms of the agreements to purchase and re-purchase, and alleging that he had advised the plaintiff that he was not satisfied, and had requested the return of the money paid, and was therefore not liable for any further moneys. The defendant also alleged fraud but did not ask relief on that ground; he counterclaimed for the money paid upon the note. The reply to the defence and counterclaim was that, by common consent, the agreement for re-purchase was put an end to. It appeared that the defendant had received the stock to which the share or unit entitled him; but a new company was formed, and he, without the privity of the plaintiff, exchanged the original stock for stock in the new company. The Judge in the Division Court dismissed the action and allowed the defendant's counterclaim for the money paid upon the note:—

Held, upon appeal by the plaintiff, that the original stock was the real thing purchased by the defendant, and if he had continued to hold it and had offered before or at the trial to return it to the plaintiff, his defence would have been perfect; but the stock in the new company was not the thing that was to be returned in order to entitle the defendant to take advantage of the agreement to repay.

The defence therefore failed; and the case should be treated as though the defendant was counterclaiming damages for fraud; but the Judge in the Division Court had no right to try the question of fraud—that was beyond his jurisdiction.

Therefore, following the directions of the Division Courts Act, sec. 63(1), the Court directed judgment to be entered for the plaintiff for the amount of the balance of the note with interest and costs of the action and appeal, and stayed the issue of execution until the counterclaim had been disposed of by some Court having jurisdiction, with leave to apply in case of undue delay.

Per MASTEN, J.A.:—A contract induced by fraud is voidable, not void, and until the party defrauded makes a clear election to repudiate the transaction the contract stands. On the evidence in this case, the contract was affirmed; and there was no jurisdiction in the Division Court to try the counterclaim.

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AN appeal by the plaintiff from the judgment of the First Division Court of the District of Algoma dismissing an action brought for \$190.25 on a promissory note and allowing the defendant's counterclaim for \$391.65 money paid by the defendant upon the note, the plaintiff having agreed to repay the defendant if the latter should at any time be dissatisfied with his "proposition."

October 7. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

J. W. Pickup, for the appellant, argued that the Division Court had no jurisdiction to entertain the counterclaim. By common consent the defence and counterclaim were put an end to. The Judge should have found that the defendant had parted with the share in the syndicate which he had bought, had accepted stock in a company in lieu thereof, which stock he had exchanged for the certificate which he now holds, and that he is unable to return to the appellant the share in the syndicate, and so is precluded from enforcing the alleged agreement. Reference to *Leake on Contracts*, 7th ed., p. 264.

W. J. Hanley, for the defendant, respondent, contended that the appellant had entered into a written contract with the respondent to return the money if he (the respondent) were not satisfied, and should return it. The stock which the defendant now offered to return was really the same stock which he got, because, in the first place, a syndicate had been formed which was later to be turned into a company. This was re-organised, and its stock, which was offered back now, had been in the contemplation of the parties from the beginning.

November 7. RIDDELL, J.A.:—This is an appeal by the plaintiff from the judgment of the First Division Court of the District of Algoma whereby his action was dismissed with costs and judgment given for the defendant on his counterclaim to the amount of \$391.65.

Most of the difficulty in the action and practically all of the argument before us were due to the inartistic manner in which it was presented in the Court below; counsel before us left nothing to be desired in skill or diligence.

Accepting, as we should, the findings of the learned trial Judge, the following are the facts.

The plaintiff and one Hall were promoting a mining scheme through a "syndicate," i.e., a partnership, whose sole purpose was to form a joint stock company, in which the members of the syndi-

cate should be interested in proportion to their positions in the syndicate—a perfectly familiar and wholly proper business measure. By fraudulent misrepresentations (as it is alleged) they induced the defendant, an illiterate, to buy a “share or unit” in the syndicate. The defendant was given a writing whereby the plaintiff agreed to “pay him back his money with interest at any time he was not satisfied with the proposition.” The purchase-price was \$500, for which a promissory note was taken, and the defendant has paid from time to time sums of money reducing the amount alleged to be payable to \$190, exclusive of interest.

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The plaintiff sued in the Division Court for this sum and interest; the defendant disputed the claim “on, among other grounds,” the ground that the note was given pursuant to the terms of the agreement mentioned and the agreement of the plaintiff “to repurchase the share or unit at any time the . . . defendant might wish;” that the defendant had advised the plaintiff that he was not satisfied, and had requested the return of the money paid, and “the defendant is, therefore, not liable to the plaintiff for payment of any further moneys.” Fraud is also alleged, but no relief is asked on that ground. Then the counterclaim is made for \$391.65 money paid upon the note.

On these pleadings, which are perfectly regular and proper, the action was sent to trial. The situation is obvious—the defendant makes no attempt to repudiate the agreements in writing between himself and the plaintiff; on the contrary, he sets them up, and claims upon them not only a defence to the action but also a counterclaim for the return of money paid—the action being based upon the written note, the defence and counterclaim are based upon the written agreement. The answer to the defence and counterclaim is that, by common consent, the latter agreement was put an end to.

If the defendant was in a position to take advantage of the promise of the plaintiff to repay, his defence was perfect—the agreement to repay necessarily implying that no further money was to be called for. So, also, his counterclaim was well-founded, and might be allowed if within the jurisdiction of the Court; and, if not within such jurisdiction, could be dealt with under sec. 63 of the Division Courts Act, R.S.O. 1927, ch. 95.

The difficulty in the defendant’s way is what is argued to be the bar occasioned by his own conduct. The agreement to repay, properly interpreted, clearly means that the defendant, becoming dissatisfied with his purchase and wishing his money back, is to return what he has received and get back the money paid together

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with interest on it. If he does this, his rights are clear; but, if he does not pursue this course, whether from inability or indisposition to do so, he may sue for damages for the fraud practised upon him: *S. Pearson & Son Ltd. v. Dublin Corporation*, [1907] A.C. 351.

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The same facts that would establish the defence would be equally effective, and for the same reasons, to establish the counterclaim.

Examining the facts, it appears from the evidence believed by the learned trial Judge that the defendant, being entitled to a "unit" in the syndicate, received the stock to which the ownership of the "unit" entitled him, as had been contemplated by all parties. This stock may well be considered the real object of the purchase, and I am of opinion that if the defendant had continued to hold this stock, and offered to give it to the plaintiff before or at the trial, his defence would have been perfect. But he did not so act; a new company was formed, and he exchanged the original stock, which may fairly be considered the real thing purchased, for stock in the new company—which was something quite different. This does not appear to have been done with the privity of the plaintiff, so that it cannot be successfully set up—and before us it was not set up—that this new stock was the thing received, which was to be returned in order to entitle the defendant to take advantage of the agreement to repay.

In my view, then, this defence fails; and the case should be treated as though the defendant was pursuing a counterclaim for damages for fraud. In that view, the trial Judge had no right to try the question of fraud at all—that was beyond his jurisdiction; and any statement fixing the plaintiff with fraud is *coram non judice*; neither he nor we can in this action pass upon this important question.

What the learned trial Judge should have done—and what we, giving the judgment which the Court below should have given, should do—is to follow the statutory directions of the Division Courts Act, sec. 63 (1), i.e., direct judgment to be entered for the plaintiff for the amount of the balance of the note with interest and costs, and we should give the plaintiff his costs of appeal, as he had to come here to get his rights; but we should stay the issue of execution until the counterclaim has been disposed of, by some Court having jurisdiction—with liberty to apply in case of undue delay.

LATCHFORD, C.J., and ORDE and FISHER, JJ.A., agreed with RIDDELL, J.A.

MASTEN, J.A.:—Appeal from a judgment of his Honour Judge Hall, sitting in the First Division Court of the District of Algoma, whereby the plaintiff's action was dismissed and judgment entered in favour of the defendant on his counterclaim for the sum of \$391.65. The circumstances giving rise to the action are set out in the judgment of my brother Riddell and need not here be repeated.

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It is trite law that a contract induced by fraud is voidable, not void, and until the party defrauded makes a clear election to repudiate the transaction the contract stands. The law in such a case was very clearly laid down many years ago in the case of *Clough v. London and North Western Railway Co.* (1871), L.R. 7 Ex. 26, 34, where it is said:—

“The fact that the contract was induced by fraud did not render the contract void, or prevent the property passing, but merely gave the party defrauded a right, on discovering the fraud, to elect whether he should continue to treat the contract as binding or disaffirm the contract and resume his property . . . If it can be shewn that the (party defrauded) has at any time after knowledge of the fraud, either by express words or by unequivocal acts, affirmed the contract, his election has been determined for ever. . . . The party defrauded may keep the question open so long as he does nothing to affirm the contract.”

And at p. 35: “The question is, has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? or has he elected to avoid it? or has he made no election? . . . So long as he has made no election he retains the right to determine it either way, subject to this, that if in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind.”

An election to affirm, once made, is irrevocable, and such election may be implied either from lapse of time after the fraud is discovered or from acts done in pursuance of the contract subsequent to the discovery of the fraud. The test is whether, with knowledge of the fraud, the party defrauded has elected to affirm.

I am unable to find in the evidence any information regarding the precise time when the defendant became aware that he had been defrauded, but a careful search throughout the evidence leads me to the view that the defendant's course of conduct operated as an election in affirmance of the contract. Hence it becomes unnecessary to determine whether the defendant could have de-

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 1930. repudiate the contract at once on discovering the fraud, even
 though *restitutio in integrum* was not possible.

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 Masten, J.A. In Broom's Legal Maxims, 9th ed., p. 476, it is said: "As a
 general rule a contract cannot be made the subject of an action
 if it be impeachable on the ground of dishonesty or as being
 opposed to public policy—if it be either *contra bonos mores*, or
 forbidden by the law. In answer to an action founded on such
 an agreement, the maxim may be urged, *ex maleficio non oritur
 contractus*." Having regard to this statement, I desire to reserve
 my opinion on the question whether, if prompt repudiation had
 been established, the plaintiff's action would properly have been
 dismissed.

On the evidence, I am of opinion that the contract was affirm-
 ed; that there was no jurisdiction in the Division Court to try
 the counterclaim; and that the order of this Court should go in
 the terms proposed by my brother Riddell.

Order as stated by RIDDELL, J.A.

[APPELLATE DIVISION.]

1930. J. H. CRANG & Co. LTD. v. W. F. M. PLOTKE & Co.

Nov. 7. *Brokers—Purchase of Shares on Exchange for other Brokers—Delay
 in Delivery of Certificates—Refusal to Accept—Whether Delay
 Unreasonable.*

The defendants, stockbrokers in Calgary, on the 14th September, 1929,
 wired the plaintiffs, stockbrokers in Toronto, to buy certain shares
 at a named price. The plaintiffs were, to the knowledge of the
 defendants, members of the Toronto Stock Exchange. The plain-
 tiffs bought the shares upon the Exchange on the same day and at
 the named price. The defendants knew that the shares would be
 bought on the Exchange and according to its rules and customs.
 The plaintiffs were not able to procure delivery of the certificates
 for the shares until the 27th September. On the 1st October they
 drew on the defendants for the price, attaching the certificates to
 the draft. The defendants on the 4th October refused to take
 delivery on account of the delay:—

Held (RIDDELL, J.A., dissenting), that, in the absence of an express
 stipulation as to the immediate forwarding of the certificates or
 of a demand to forward them at once, the delay in procuring and
 forwarding them was not unreasonable, and the defendants were
 not justified, after the plaintiffs had procured and forwarded the
 certificates, in repudiating the contract and refusing to pay.

DeWaal v. Adler (1886), 12 App. Cas. 141, distinguished.

Per RIDDELL, J.A.:—The delay was unreasonable, and there was no
 excuse for it either by appeal to the rules of the Exchange or other-
 wise.

AN appeal by the defendants from a judgment of WIDDIFIELD, 1930.
 Jun. Co. C.J., in an action in the County Court of the County J. H. CRANG
 of York, in favour of the plaintiffs, for the recovery of \$687.88 & Co. LTD.
 and costs, the action being for a balance alleged to be due in v.
 respect of certain shares purchased by the defendants. W. F. M.
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 & Co.

October 9. The appeal was heard by LATCHFORD, C.J., RID-
 DELL, MASTEN, ORDE, and FISHER, JJ.A.

H. J. Martin, for the appellants, argued that the shares had not been delivered by the plaintiffs within a reasonable time: *De Waal v. Adler* (1886), 12 App. Cas. 141. The appellants were not bound by any custom or practice of brokers on the Standard Stock and Mining Exchange which had the effect (as alleged) of delaying delivery of the shares. Reference to *Fletcher v. Marshall* (1846), 15 M. & W. 755; Halsbury's Laws of England, vol. 21, p. 242; *Barnard v. Foster* (1915), 84 L.J.N.S.K.B. 1244.

Lyle Ramsey, for the plaintiffs, respondents, contended that there had been no undue delay in the delivery of the shares, and that the appellants were well aware of the custom of the Exchange which justified such delay as there was. Reference to 42 Eng. & Emp. Digest, p. 795; *Cruse v. Paine* (1868), 19 L.T.R. 127.

November 7. ORDE, J.A.:—The question whether or not the delay on the part of the plaintiffs in forwarding the stock certificates to the defendants was so unreasonable as to justify the defendants in refusing to accept them on their arrival in Calgary, is, in my opinion, a mere question of fact to be determined upon all the circumstances of the case. The defendants were stock-brokers in Calgary. The plaintiffs were stockbrokers in Toronto with a seat on the Standard Stock and Mining Exchange in Toronto. The defendants knew that the stock which they required the plaintiffs to buy for them would be bought on the Exchange, and according to its rules and customs. The plaintiffs bought this stock according to those rules and so notified the defendants. There was some delay in getting the certificates, and the only question is whether the delay justified the defendants in refusing to accept and pay for them on their arrival in Calgary.

The defendants rely on *De Waal v. Adler*, 12 App. Cas. 141. That case does not lay down as a rigid principle of law that in every case there must be an immediate acquisition by the purchasing broker of the stock certificate and delivery thereof to his customer. The judgment there is, I think, only applicable to the particular circumstances of that case.

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In the present case, in the absence of some express stipulation as to the immediate forwarding of the certificates or of a demand to forward them at once, I think that the delay in procuring them and sending them forward was not unreasonable, and that the defendants were not justified, after the plaintiffs had procured and forwarded the certificates to complete the bargain, in then repudiating the contract and refusing to pay.

The appeal should be dismissed with costs.

FISHER, J.A.:—Appeal by the defendants from a judgment of his Honour Judge Widdifield, one of the Judges of the County Court of the County of York. The parties to this appeal are stock-brokers—the respondents (plaintiffs) carrying on business in Toronto and the appellants (defendants) carrying on business in Calgary.

On the 14th September, 1929, the appellants wired the respondents to “buy three hundred Calmont three sixty-five or better.” Calmont was a western oil stock. The respondents wired the appellants on the 14th September, “Bought six Royalite one hundred and thirty stop Bought three hundred Calmont three sixty-five stock this.” The Royalite shares have nothing to do with this appeal.

The respondents were, to the knowledge of the appellants, members of the Standard Stock Exchange, and the appellants knew that the purchase of the Calmont shares was to be made on the floor of the Stock Exchange. A representative of the respondents purchased these shares on the floor of the Stock Exchange from Scott & Co., brokers, and Scott & Co. on that day confirmed in writing the sale to the respondents. On the 14th September, 1929, the respondents mailed the usual “bought note” to the appellants. The bought note reads: “We have this day bought for your account and risk (*subject to the rules and regulations of the Exchange where executed*) Scott, 300 Calmont 3.65; \$1,095; brokerage 6; total \$1,101.00 payable at par in Toronto or in funds of the city where order is executed.” The respondents obtained delivery of 100 shares of Calmont on the 17th September from Scott & Co.; but, as Scott & Co. did not then have the remaining 200 shares on hand, they gave to the respondents a certified cheque “called a lieu cheque” as security that the 200 shares would be forthcoming.

The respondents received from Scott & Co. the 200 shares on the 27th September, and on the 1st October placed a demand draft on the appellants with certificates representing 300 shares of Calmont attached. The appellants refused payment and wired

the respondents on the 4th October: "Re three hundred Calmont of September fourteenth. Certificates have not arrived yet long overdue. My client refuses to take delivery after waiting so long. Consider order cancelled. Keep same."

The respondents, being unable to get the appellants to accept delivery of the shares, resold them on the Exchange at a loss, and this action followed.

There is no dispute as to the *bona fides* of the resale of the stock by the respondents or the amount claimed as due by reason of the resale. When the appellants wired in the order to the respondents to purchase the stock, they knew, as stated, that the purchase was to be made on the floor of the Exchange, and subject to the rules and regulations of the Exchange. Frederick Crawford, president of the Standard Stock Exchange, was called by the respondents and was asked this question:—

"Q. You have heard about this stock that was purchased, 300 Calmont at 3.65? A. Yes.

"Q. What do you say as to the delivery of that stock? A. Of course that all depends, but it is the custom of brokers to hold the shares unless they are otherwise ordered.

"Q. These shares which were purchased by Mr. Plotke, could he have resold these shares through some broker at any time? A. Yes.

"Q. In this case we have been told that 100 shares were purchased and a lieu cheque taken for 200 shares. What do you say as to that? A. That is quite customary."

And he also stated that it was just a matter of courtesy between brokers and that brokers took these lieu cheques when they could not get immediate delivery of the shares.

"Q. What do you say as to the delivery of this stock? A. I say that he got it within a reasonable time."

The question is, was there unreasonable delay in the delivery of the stock, and, if there was, were the appellants to blame? In determining that question it is important to bear in mind that the appellants are brokers, and as such had knowledge of how shares are purchased on the floor of the Exchange. They knew that it was the usual practice to purchase from some other broker on the floor of the Exchange, and that it was possible there might be some delay in that broker fulfilling his contract. There is nothing in the evidence indicating that Scott & Co. were not responsible brokers, or that the respondents in this transaction did not have a right to believe that Scott & Co. would deliver the stock in the usual course. When Scott & Co. produced 100

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shares only and the lieu cheque representing the value of the remaining stock as security that it would be forthcoming, the respondents had every reason to believe, and, so far as the evidence shews, did believe, that these shares would be delivered at any time, and in the meantime, not having any notice from the appellants that haste was required in forwarding the shares, the respondents followed the usual custom of brokers by waiting for Scott & Co. to deliver. The respondents gave evidence that, had the appellants notified them that they, or their customer—if they had any in this transaction—required a speedy delivery, they would have taken steps to borrow the stock elsewhere; but, being left without notice, it was not the practice of brokers on the Exchange to insist upon immediate delivery.

A transaction such as this must not be confused with that of an individual calling at a broker's office and giving an order to purchase a certain stock and at the same time informing the broker that he required the stock for a particular purpose and wanted a speedy delivery of the certificate. In such a case it would be the duty of the broker, if he could not get the stock at an early date, to inform his customer and then act according to his customer's instructions. But a pertinent question to be asked is, how were the appellants in this transaction injured by the alleged unreasonable delay? If they or their purchaser required the stock certificates only for the purpose of locking them up in their safety deposit box, they could have had them on the 4th October; but if they wanted them for resale the evidence is that they could have sold them at any time on the strength of the "bought note."

It was held in *Forget v. Baxter*, [1900] A.C. 467, that when one employs a broker to do business on the Stock Exchange he should, in the absence of anything to shew the contrary, be taken to have employed the broker on the terms of the Stock Exchange.

The only case in point in our own courts that I have been able to find, and to which we were not referred on the argument, is *Buchan v. Newell* (1913), 29 O.L.R. 508. In that case a broker at Haileybury was engaged to purchase certain shares in a company, and the broker wired the order in to his Toronto brokers. The purchase was made, and the purchaser was promptly notified, but over a month elapsed before the certificates arrived and were ready for delivery. The purchaser refused to take delivery because of unreasonable delay. Mulock, C.J., was of opinion, and all the other members of the Court agreed, that the broker was not answerable for the delay; that the plaintiff, having been

impliedly authorised by the defendant to make the purchase through a Toronto firm, and it having made a proper selection of agents, was not responsible for the manner in which the order was filled, and that in any event the purchaser, having been advised of the purchase, could have sold his stock as readily as if the certificates had been in his possession, and that there was no unreasonable delay.

The case of *De Waal v. Adler*, 12 App. Cas. 141, relied on by the appellants, has no application and differs in two important particulars: in that case the transaction was between individuals and was not a purchase and sale between brokers through and subject to the rules and customs of the Stock Exchange, and the purchaser before delivery had made many complaints of the delay. The general rule, I think, is that where a broker is employed to purchase a certain stock—unless there is some express agreement to the contrary—his duty is to purchase promptly, and to report the transaction to the purchaser promptly, to receive the stock and to have the certificate ready whenever the purchaser calls for it and is ready to pay.

In this case we have one broker engaging another broker to negotiate a deal through a Stock Exchange. We have evidence of a prompt purchase through the Exchange on the 14th September, a prompt notice given and a “bought note” sent to the other broker. There was no notice that any haste in delivery was required; the brokers (the respondents) followed the usual custom of brokers on the Exchange in waiting for delivery; and, as soon as delivery was made, on the 1st October, the certificate was forwarded to Calgary. On these facts my opinion is that there was no unreasonable delay and the defence fails.

I would dismiss the appeal with costs.

LATCHFORD, C.J., agreed with FISHER, J.A.

MASTEN, J.A.:—I agree with the conclusion of my brothers Orde and Fisher, and with their reasons, to which I cannot usefully add.

RIDDELL, J.A.:—The plaintiffs are a stockbroking corporation in Toronto; the defendants are also stockbrokers, carrying on business at Calgary. Some time in August, the defendants engaged the plaintiffs to buy for them 300 shares of Calmont Oil, \$3.65 or better; the plaintiffs notified them on the 14th September that they had bought it at \$3.65. Omitting for the moment intervening facts, on the 1st October, the 300 shares were attached

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to a draft for their value, including commission, and sent on to the defendants at Calgary. When these reached Calgary, the draft was refused and was returned without acceptance. On the same day as the refusal, i.e., on 4th October, the defendants notified the plaintiffs that, as the stock had not arrived, their client refused to accept it "after waiting so long," and said "Consider order cancelled, keep same." On the receipt of this telegram, the plaintiffs wrote threatening to have the defendants "blackballed so fast in Calgary that none of the members on the Calgary Stock Exchange" would do business with them. This proving ineffective, the returned draft was sent off again to Calgary, with no better success than before.

Another letter proving equally ineffective to bring about payment for the shares, this action was brought claiming \$1,114.36. The defendants pleaded unreasonable delay, and the case came on for trial before his Honour Judge Widdifield, who gave judgment for the plaintiffs. The defendants now appeal.

There can be no doubt of the law—and, indeed, it is not disputed, and in view of the decisions could not successfully be disputed, that in the case of stock such as this, being of a fluctuating value, actual or potential, the time for delivery is a reasonable time, and that unreasonable delay in the delivery of the stock or the certificate will justify the purchaser in refusing to accept. If any doubt could be raised upon that point, the case in the Judicial Committee of *De Waal v. Adler*, 12 App. Cas. 141, would resolve it.

Then as to the delay—in this case from the 14th September to the 1st October, seventeen days—the plaintiffs endeavour to justify it by appeal to the rules of the Standard Stock Exchange. Assuming that these rules, were they obligatory and applicable, would excuse the delay, I am unable to find that there is anything whatever of anything like a compulsory nature which could justify delay of any kind. There is, indeed, a rule regulating how delay in the delivery of the stock or certificate may be effected if the parties agree and so desire, but there is nothing in the rules calling for any delay unless the parties both desire it.

I cannot find here any excuse for the delay on the part of the plaintiffs, and would allow the appeal and dismiss the action with costs, here and below.

Appeal dismissed (RIDDELL, J.A., dissenting).

[ORDE, J.A.]

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Nov. 8.

Succession Duties—Will—Bequests to Charities—Gifts of Residue to two Foreign and two Domestic Charities—Incidents of Duties inter se—Ontario Succession Duty Act, R.S.O. 1927, ch. 26, secs. 6, 19—Exemptions—Distinction between Legacies and Gifts out of Residue.

The testator died domiciled in Ontario, possessing no real estate in Ontario or elsewhere, but large amounts of personalty in Ontario and the State of Minnesota, so that the whole of his estate as personalty fell to be administered under the laws of Ontario and became the subject of succession duties under the Ontario Succession Duty Act, R.S.O. 1927, ch. 26, under which no duty is leviable on property devised or bequeathed for religious, charitable or educational purposes to be carried out in Ontario or by a corporation or person resident in Ontario (sec. 6). But there is no such exception when the object of the corporation or person is beyond the Province. By his will, the testator made many bequests, among others an annuity to his widow, and out of the residue of his estate gave large sums to two educational institutions in Ontario and to two Minnesota charities. The gifts to the Ontario institutions were thus exempt from Ontario duties; but, while the State of Minnesota and the Federal Government of the United States in levying succession or inheritance duties or taxes in respect of the portion of the estate situate in Minnesota had granted exemption to the two Minnesota charities, they had collected duties or taxes from the estate in respect of so much of the Minnesota assets as had proportionately passed to the two Ontario institutions. By clause 19 of the will, all legacies, funds and stocks transferred to the trustees and the widow's annuity were declared to be "free of succession duty," and certain other legacies were also to be paid "free of all succession duty:"—

Held, that it was not possible to exonerate the beneficiaries of all the residue from the burden or effect of succession duties — the duties must be paid, and, so far as the Crown is concerned, they are imposed on the theory that the beneficiaries pay them—and the effect of the testator's declaration was to throw the duty in respect of the exempted gifts upon the estate as a testamentary expense, so that in the result it is paid out of residue.

The word "legacy" does not *primâ facie* include a gift of residue; and the real meaning of "legacies" as used in clause 19 must be sought in the will itself.

And *held*, having regard to *Ward v. Grey* (1859), 26 Beav. 485, and other cases cited in Theobald on Wills, 8th ed., pp. 165, 166, and 233, and to the anomaly of a direction that a gift of residue shall be free of duty, and to the dictionary supplied by the will itself, as well as to the fact that by clause 19 the testator distinguishes the gifts which are to be free from duty by mentioning them separately, according to their types, the word "legacies" as used there was not intended to include the gifts of residue.

A gift of a specific thing as part of the residue does not make that gift a specific legacy.

The succession duties having been imposed, and paid by the executors, they are required by sec. 19 of the Act to deduct the amount of the duty before paying over the gifts to the beneficiaries; and, the gifts of residue to the four charities not being in any sense free of succession duties, each must bear its share of the duties imposed in respect of its share of the residue. The executors, having paid the

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duties, are entitled to deduct the duties paid in respect of that share before paying over the share. Upon no other terms are the beneficiaries, either domestic or foreign, entitled by the law of Ontario to demand or enforce the satisfaction of the gifts to them under the will.

The same reasoning applies to the succession duties or inheritance taxes imposed by the State of Minnesota and the Federal Government—in so far as they are based upon the estate passing to the two Ontario charities, those two must bear them—the two Minnesota charities are exempt from any such taxes.

AN application by the Toronto General Trusts Corporation, executors and trustees under the will of Edwin Canfield Whitney, deceased, for an order determining the incidence as among four charities of the succession duties charged respectively by the Province of Ontario, the State of Minnesota, and the Federal Government of the United States of America, in respect of gifts out of residue of the estate of the deceased.

June 21. The motion was heard by ORDE, J.A., in the Weekly Court, Ottawa.

E. F. Burritt, K.C., for the Toronto General Trusts Corporation, executors and trustees.

W. N. Tilley, K.C., for St. Barnabas Hospital, Minneapolis, and The Sheltering Arms, Minneapolis.

H. H. Davis, K.C., for the University of Toronto and Wycliffe College, Toronto.

November 8. ORDE, J.A.:—This motion raises a question as to the incidence, as among the four charities above mentioned, of the succession duties charged respectively by the Province of Ontario, the State of Minnesota, and the Federal Government of the United States of America, in respect of the gifts of the residue of the estate.

The late Edwin Canfield Whitney, who was domiciled in Ontario, died at Ottawa on the 6th February, 1924. By his will the Toronto General Trusts Corporation are appointed executors and trustees, and the whole estate is devised and bequeathed to them in trust to convert into money or to continue existing investments, and out of the proceeds or of ready money to pay funeral and testamentary expenses and debts, and to “provide for and pay the legacies and the annuity directed by this my will, and stand possessed of the residue of the proceeds of said sale, calling in, conversion and investment as aforesaid, after apportioning and setting apart sufficient for said legacies and annuity, upon the trust herein declared as to my residuary estate.”

Then follow a large number of pecuniary legacies, and specific gifts of securities to his widow, and to many collateral relations and to friends. Some of these are absolute and some for life with remainder to issue or to some of the beneficiaries of the residuary estate.

There is then provision (clause 12) for an annuity to his widow, and (clause 13) a pecuniary legacy to a hospital.

Then follows clause 14 of the will, which opens as follows:—

“All the rest and residue of my estate, after providing for the payment of debts, legacies, trust funds, trusts and annuity aforesaid, I direct my trustees to invest and keep invested for a period of five years after my decease (should my wife Sarah Whitney continue living for such period) to the end that the same shall accumulate for distribution as part of my residuary estate,” and then a proviso that if his wife should die during the five years the trustees are to distribute the residue “within at least one year thereafter.”

Clauses 15 and 16 then provide for the distribution of the residue when the time for distribution arises as fixed by clause 14. Clause 15 deals with the distribution of 30 shares of the Mississippi Land Company (a Minnesota corporation) and directs that in case they should form part of his residuary estate, “after providing for all legacies, bequests and annuity herein set out,” the said shares shall be distributed as follows: 8 shares to St. Barnabas Hospital of Minneapolis, Minnesota; 7 shares to The Sheltering Arms (described earlier in the will as a charitable corporation) of Minneapolis; 8 shares to the University of Toronto, Toronto; and 7 shares to Wycliffe College, Toronto.

Clause 16 then disposes of the balance of the residuary estate among the four charities already mentioned, in the following words:—

“16. Upon the expiry of said five years after my decease or the prior decease of my wife as aforesaid and the distribution out of my residuary estate of the said the Mississippi Land Company shares as in the preceding paragraph provided, I direct my trustees to convert all my remaining residuary real estate, should any still be outstanding, into cash and to realise on my remaining personal estate taking such time therefor with respect to both as to avoid sacrifice thereof and distribute the same equally between the Province of Ontario, Canada, and the County of Hennepin, State of Minnesota, one of the United States of America; and with respect to the half share for distribution in the Province of Ontario aforesaid I direct my trustees to pay one-half ($\frac{1}{2}$) thereof to Toronto University, Toronto, Ontario, and one-half ($\frac{1}{2}$) thereof to

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Orde, J.A. Wycliffe College, Toronto, Ontario, and with respect to the half
1930. share for distribution in the County of Hennepin aforesaid I
 direct my trustees to pay one-half ($\frac{1}{2}$) thereof to St. Barnabas
RE Hospital of Minneapolis, aforesaid, and the other half to The
WHITNEY. Sheltering Arms of Minneapolis aforesaid. Provided that should
 the said beneficiaries elect to take over the securities so directed to
 be sold as aforesaid they may do so and my trustees instead of
 making sale thereof shall deliver to the beneficiaries apportioning
 such securities according to value to the parties and in the pro-
 portions above set out."

The only other clause in the will which has any bearing upon the questions raised is number 19:—

"19. All legacies, funds and stocks transferred to my trustees and the annuity herein provided shall be free of succession duty."

There is also a codicil which makes an addition to the legacies bequeathed to the sons of his wife by an earlier marriage in case she should predecease him, and the only passages in the codicil which it is suggested may assist in interpreting the will itself upon the question of succession duties are the provision "The said sums are to be paid free of all succession duty," and in a further gift to his wife's sister in case his wife predeceases him, the provision that it is to be "free from all succession duty."

Under the Ontario Succession Duty Act, as it was at the date of the testator's death and as it is now, R.S.O. 1927, ch. 26, no duty is leviable on property devised or bequeathed for religious, charitable or educational purposes to be carried out in Ontario or by a corporation or a person resident in Ontario (see sec. 6). But no such exception is given when the object or the corporation or person is beyond the Province. It follows therefore that the gifts to the University of Toronto and to Wycliffe College are exempt from Ontario duties, while those to the two Minneapolis charities are not.

On the other hand, the State of Minnesota and the Federal Government of the United States in levying succession or inheritance duties or taxes in respect of that portion of the estate situate in the United States have granted exemption to the two Minnesota charities, but have collected duties or taxes from the estate in respect of so much of the American assets as have proportionately passed to the two Ontario charities.

The question is not complicated by the existence of any realty, for the testator had none either in Ontario or elsewhere, so that, as he died domiciled in Ontario, the whole of his estate as personalty fell to be administered under the laws of this Province and became the subject of succession duties under our Succession Duty

Act. The American assets were therefore not only included with the Ontario assets in determining the aggregate value of the estate for the purpose of fixing the rate of duty, but duties were levied in respect thereof. So that duties were levied as against the two Minneapolis charities in respect of all that portion of the whole estate which passed to them. The total amount so passing to those two charities was \$944,417.85, and the succession duties levied in respect thereof at the rate of 35 per cent. amounted to \$330,546.25.

On the other hand, the duties or taxes levied by the State of Minnesota and by the United States Government in respect of the interests in the American assets passing to the two Ontario charities amounted in the case of Minnesota to \$39,293.52 and in the case of the United States Government to \$2,227.60.

The result is, of course, if each of the four charities is required as between itself and the estate to pay the duties levied upon its share in the residue of the estate under clauses 15 and 16 of the will, that the net benefit received by the two Minneapolis charities will be nearly \$300,000 less than that received by the two Toronto charities. And this notwithstanding the fact that the testator, by clauses 15 and 16, made an equal division as between the two Minneapolis charities on the one hand and the two Toronto charities on the other of his whole residuary estate. There is of course nothing extraordinary or anomalous in this result. The same thing would happen if a testator were to divide the residue of his estate equally between two persons, one of whom came within the class paying a low rate of duty and the other a stranger in blood paying a higher rate. And in such case the difference in the net benefit might be greatly increased if part of the estate was abroad and the two residuary legatees were there subjected to a greater difference in duties in respect of those foreign assets.

It was natural that at the outset it was suggested that there might be some provision in the will for the payment of all the succession duties out of the residue, leaving the balance for equal distribution among the charities. A solution in that way would have been simple. The only clause upon which any such ruling could be based was number 19, and it could only be by holding that the word "legacies" as there used embraced all the bequests in the will, including the gift of the residue.

If the word "legacy" had always a meaning so comprehensive that it must be deemed in every case to include a residuary gift, there would be no difficulty, but the conclusion from the authorities reached by the author of Theobald on Wills, 8th ed., p. 233, is that

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The truth is that the real meaning of the word as used by the testator must be sought in the will itself. The problem is discussed by Romilly, M.R., in *Ward v. Grey* (1859), 26 Beav. 485, at p. 492, where he says: "On the question of whether the residue is to contribute, I have felt more difficulty. It is a question on which I feel satisfied different persons will come to opposite conclusions, arising from the peculiar view they may take of the testator's words, and the form which they may attribute to them. On one hand, it is true that 'residue' is not a 'legacy' in the ordinary sense of the term; and it was justly observed that 'residue' is what remains after payment of legacies. On the other hand, the person who takes the residue is always called *residuary legatee*; nor is there any other designation that I am aware of that is applied to the person taking that interest under any will." He then goes on to discuss the language of the will and comes to the conclusion that by the direction that "every legatee" (for those were the words the testator used) should contribute one per cent. of his legacy to a certain fund, the testator intended to include the residuary legatee as well as the others.

Had clause 19 provided simply that "all legacies shall be free of succession duty" there might be good ground for holding that all the duties, including those in respect of residue, must first be paid before the proportions in which it is to be divided are struck. But, strictly speaking, it is not in the nature of things possible to exonerate the beneficiaries of all the residue from the burden or effect of succession duties. They must be paid, and, so far as the Crown or Government is concerned, they are taxed on the theory that the beneficiary pays them. The taxing power is in no way affected by a testator's declaration that a legacy shall be free from duty. He cannot exempt it from duty. The effect of his declaration is to throw the duty upon the estate as a testamentary expense, so that in the result it is paid out of residue. No doubt, if a testator either expressly or by implication directed that all the gifts of residue should be free of duty, the Courts would give effect to it by directing the executors to pay the duties and charge them against the residue as a whole before proceeding to distribute what was left. But the residuary legatees would not in reality get the residue free from duty. The real effect would be that, while in the absence of any such direction the burden would have fallen upon the beneficiaries in different percentages, the aggregate burden of all the duties levied in respect of their respective shares is, by virtue of the direction, distributed ratably among them. So

that, while in that way one residuary legatee may pay less in succession duties and another more than he otherwise would, it is an anomaly to say that they get their residuary shares "free" from duty. Indeed, the only possible freedom therefrom would be confined to the partial freedom which one beneficiary derives because his share of the aggregate burden is less than it would otherwise be. The other beneficiary whose share of the residue is correspondingly diminished may well say that, far from being freed from duty, the duties he pays in consequence of the direction have been in fact increased.

How is the word "legacies" as used in clause 19 to be construed? The will itself is, I think, the dictionary and supplies the answer.

In the 3rd clause, which provides for the conversion of the estate, the testator directs the executors to pay the legacies and the annuity and to stand possessed of the residue "after apportioning and setting apart sufficient for said legacies and annuity upon the trust herein declared as to my residuary estate," indicating a clear distinction in his mind between legacies and residue. Then, before he reaches the residuary clause, the testator has made gifts of three distinct characters. There are a large number of pecuniary legacies, there is one annuity strictly so-called, namely that to his widow in the 12th clause, and he also sets aside in the hands of his trustees certain specified securities, or directs them to set aside and invest sufficient funds, for certain purposes: see clauses 7, 10, and 11. And he speaks in clauses 7 and 11 of the "transfer to" his trustees of the securities mentioned in those paragraphs and uses language with reference to the trusts upon which they are to hold them to indicate that the trustees thereafter becomes trustees for the beneficiaries and not for his estate.

So that it is quite plain when he comes to deal with the residue what he means by the words "after providing for the payment of debts, legacies, trust funds, trusts and annuity aforesaid." Those words are really unnecessary, for the residuary estate would only be what was left after making provision for all these things. But the use of these words serves to illuminate the language of clause 19. It is true that clause 19 might have been aptly inserted before clause 14, but is it really of any consequence where it appears? It is clearly intended as a general direction and appears among other directions of a general nature after he has completed the disposal of his whole estate. But I do not see how the position of the clause in the will affects its construction if its language is otherwise plain.

If he had intended to direct that every gift he had made should

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be free of duty, it would have been a simple thing to say so. Instead of that he refers specifically to the three types of gift which preceded the disposal of the residue, and which I have already mentioned, namely the legacies, the trusts created by the setting aside of money or stocks, and the annuity to his widow, and in doing so he uses language which, if not quite identical, is to the same effect as that used in the opening part of clause 14, where he commences to deal with the residue.

Having regard to the authorities I have already mentioned, and to the anomaly of a direction that a gift of residue shall be free of duty, and to the dictionary supplied by the will itself, as well as to the fact that by clause 19 he distinguishes the gifts which are to be free of duty by mentioning them separately according to their types, I find it impossible to hold that the word "legacies" as used there was intended to include the gifts of residue.

It was not suggested upon the argument, but I mention it lest I may seem to have overlooked it, that the word "legacies" in clause 19 might at any rate embrace the gifts of shares in the Mississippi Land Company which are carved out of the residuary estate by clause 15. It might be argued that the gifts in clause 15 are specific and not residuary, and that the real residue is what is disposed of by clause 16, but the gifts are designated as part of the residuary estate, and there can be no doubt that if there were a deficiency of assets the earlier legacies and trusts and annuity would have priority and the gifts in clause 15 would have to abate as part of the residue. It is quite clear that a gift of a specific thing as part of the residue does not make that gift specific in the sense that it makes it a specific legacy: Theobald on Wills, 8th ed., pp. 165 and 166.

But, apart from this, the reference to the "legacies" in clause 14 makes it clear that the gifts of stock in clause 15 were not intended to be included in that category, and if the word "legacies" in clause 19 has the same meaning as it has in clause 14, as I think it has, then the gifts in clause 15 are not free of duty.

Mr. Tilley, on behalf of the two Minneapolis charities, argued that no tax could be levied against them in respect of the assets locally situate in the United States, and further that, if by Ontario law any such tax can be levied or imposed, it can only be recovered out of the Ontario assets, and that recourse cannot be had against the United States assets for their payment.

The extreme case was suggested of a testator, domiciled in Ontario, leaving an estate of little value in Ontario, but of very great value in Minnesota, all of which was given to a Minnesota

charity. The domicile being in Ontario, the principal administration would be here, and under the *maxim mobilia sequuntur personam* the foreign assets would fall to be administered under Ontario law and would clearly be subject to succession duties even as against the Minnesota charity, notwithstanding that the bulk of the assets would be exempt from duty under the laws of that state.

It was contended that in these circumstances the Minnesota charity would be entitled to demand the delivery to it of the Minnesota assets intact, and that if Ontario wanted to impose duties in respect thereof it could satisfy itself out of the meagre Ontario assets as far as they would go and could whistle for the balance.

To support this argument it must be assumed that by the laws of the State of Minnesota there would be some means whereby the Minnesota charity could demand and enforce the delivery of the Minnesota assets or payment of their proceeds without resorting to the law of the principal administration, namely, that of Ontario, for payment. If the laws of Minnesota entitled it to do this, why of course it could be done, though any such law would be contrary to the comity by which the administration of the estate of a deceased in a country other than that of his domicile is merely ancillary to the main administration. It was not suggested that there was any such law in Minnesota, and I cannot assume that there is.

The testator died in 1924, and I assume that the foreign assets have long since been reduced into possession by the executors, and that they must now fall to be administered to all intents and purposes as if they had been situate in this Province, as indeed they are deemed to have been in the eyes of the law for the purposes of administering the estate, under the maxim just mentioned. As such, the succession thereto, that is, the right to acquire or receive the gifts thereof, depends upon the law of this Province. Under no other law can the foreign beneficiaries acquire any right to their respective benefactions under the will. By the law of this Province, that right whereby the foreign beneficiary becomes entitled to share in the succession to the testator's property is subject to duty by the Succession Duty Act.

I am not here concerned with any question as to the legislative power of this Province to impose such a tax. It has been imposed and has been paid by the executors by virtue of the provisions of the Act in that regard, and the executors are required by sec. 19 of the Act to deduct the amount of the duty before paying over the gift to the beneficiary. All that I am called upon to deal with upon this motion, after construing the will as it affects succession

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Orde, J.A. duties, is the question as to the incidence of the duties which the
1930. executors have had to pay in respect of the gifts of the residuary estate. No question was raised as to the rates of duty paid by the executors being wrong, and I must assume for the purposes of this motion that they were legally imposed by this Province and by the State of Minnesota and the United States Government.

The conclusion having been reached that the gifts of residue to the four charities are not in any sense free of succession duties, it is clear that each must bear its share of the duties imposed in respect of its share of the residue, and that the executors having paid the duties are entitled to deduct the duties paid in respect of that share before paying over the share or otherwise satisfying the gift by delivery of securities in specie, as the concluding words of clause 16 permit. Upon no other terms are the beneficiaries, either domestic or foreign, entitled by the law of this Province to demand or enforce the satisfaction of the gifts to them under the will.

The same reasoning applies of course to the incidence of the succession duties or inheritance taxes imposed by the State of Minnesota and the United States Government. In so far as they are based upon the estate passing to the two Ontario charities, they must bear them. The two Minneapolis charities were exempt from any such taxes.

Dealing specifically with the three questions submitted to me by the notice of motion, I answer them as follows:—

1. The whole of the duties imposed by Ontario in respect of the gifts to St. Barnabas Hospital and to The Sheltering Arms, amounting to \$330,546.25, shall be borne by those two charities, according to their respective shares in the estate in respect of which the same were imposed, and no part of such duties shall fall upon the University of Toronto or Wycliffe College.

2. The whole of the duties imposed by the State of Minnesota in respect of the gifts to the University of Toronto and to Wycliffe College shall be borne by those two charities, according to their respective shares in the estate in respect of which the same were imposed, and no part of such duties shall fall upon St. Barnabas Hospital or The Sheltering Arms.

3. So much of the amount of \$2,227.60 imposed by the United States Government by way of inheritance tax upon the estate as was imposed in respect of the shares of the University of Toronto and Wycliffe College in the estate shall be borne by those two charities according to their respective shares, and no part of the said sum of \$2,227.60 shall be borne by St. Barnabas Hospital or The Sheltering Arms. Some part of that sum appears to have

been assessed in respect of the gifts to persons other than residents of the United States, but the statement among the papers does not shew the distribution. It is clear that the two Minneapolis charities were exempt.

While the Minneapolis charities fail in their contention, I think that the questions raised were of sufficient doubt and difficulty to justify the application, and that the costs of all parties should be paid out of the estate, those of the executors as between solicitor and client. If the parties desire it and can give me some idea what they ought to be, the order may fix the costs.

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[APPELLATE DIVISION.]

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Fire—Action for Injury to and Loss by Person Living in Apartment-house from Fire in Building—Allegation of Negligence of Owners and Caretaker—Specification of Grounds—Findings of Jury—Evidence—Onus—Accidental Fire—Accidental Fires Act, R.S.O. 1927, ch. 146—Whether Duty of Owners to Supply Fire-equipment—Motion for New Trial—Direction to Jury—Accidental Origin of Fire—Subsequent Failure to Control Alleged but not Proved.

The plaintiff was tenant of an apartment in a building owned by two of the defendants, and brought this action against the owners and the caretaker of the building, alleging that a fire had broken out in the basement of the building and had spread through the upper floors, and that she was injured before she was rescued from the building, and had also lost property said to have been in her apartment and to have been stolen therefrom. She charged the defendants with negligence resulting in the injury and loss, specifying as negligence: (1) the collecting and maintaining in a closet in the basement oily and inflammable rags; (2) that the defendant caretaker, knowing that a fire had started, that the rooms were occupied, and that there were no fire-escapes, omitted to warn the tenants and omitted to sound the fire-alarm; (3) that the defendants omitted and refused to come to the assistance of the plaintiff while there was time to rescue her before she was injured; (4) that the caretaker was inefficient and the landlords were aware of his inefficiency, that they failed to inspect the basement properly, and that the fire was occasioned thereby. At the trial of the action there was a motion for a nonsuit, but the case was allowed to go to the jury, and all evidence tendered either for the plaintiff or the defendants was heard. The jury found that the fire was not caused by the negligence of the defendants. To question 4, "After the fire was discovered, was there any negligence on the part of the defendants in controlling the fire?" the jury answered: "The defendants were unable to properly control the fire owing to the fact that they did not have adequate equipment to control the fire, such as stand-pipe and hose, fire-pails, ladders, and fire-extinguishers." On these findings the trial Judge dismissed the action:—

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Held, on appeal by the plaintiff, that the answer to question 4 was based upon a theory nowhere suggested in the statement of claim, and there was nothing in the evidence upon which the finding could be based; furthermore, the finding did not justify the maintenance of the action, for there was no duty on the part of the defendants, either at common law or by statute, to supply fire-escapes or fire-fighting equipment.

2. The plaintiff contended that, the fire having taken place upon the defendants' premises, they were liable unless they proved affirmatively that the fire was accidental in the sense that it was without any negligence on their part—and that the plaintiff was prejudiced by the Judge's ruling that the onus was upon the plaintiff to establish the negligence alleged:—

Held, that, as no admissible evidence was rejected, as the whole case went to the jury, and the jury found that the fire did not arise from the negligence of the defendants, the contention was not maintainable.

The case did not fall within any exception to the general rule that a new trial will not be directed because of an erroneous ruling as to onus, where the whole case of both parties has been fully placed before the jury, and the jury have experienced no difficulty in determining the issue.

The plaintiff not having relied upon any general allegation of negligence, but having specifically defined the negligence (as above), the onus was upon the plaintiff to support the charges made.

3. The defendants pleaded that the fire was purely accidental and relied upon the Accidental Fires Act, R.S.O. 1927, ch. 146:—

Held, that, although the language of this statute, and that of 6 Anne ch. 31, from which it is taken, contains wide terms, an "accidental fire" does not include a fire which had its origin in negligence, but is confined to the case of a fire produced by mere chance, or incapable of being traced to any cause.

The plaintiff is required affirmatively to shew negligence before he can recover, unless the facts raise an inference of negligence.

Filliter v. Phippard (1847), 11 Q.B. 347, followed.

The owners of the building were never in such a position that the fire could be said to be their fire, nor was it a dangerous thing brought by them upon their premises for their own purposes—they, as well as the plaintiff, were the victims of a disaster for which they were not shewn to have been responsible.

Per MULOCK, C.J.O., and HODGINS, J.A.:—The fire was an accidental fire, and the defendants the owners of the premises in which it originated are protected by the statute from an action for damages; but if, after a fire starts accidentally and evidence is given which shews negligence or some breach of a duty arising out of the circumstances due to the progress of the fire which causes loss or damage to an individual or his property, there is nothing in the statute that prevents recovery; the onus is on the plaintiff; and here there was no evidence sufficient to overcome the bar created by the statute.

AN appeal by the plaintiff from the judgment of WRIGHT, J., at the trial with a jury of an action for damages for injury and loss sustained by the plaintiff by a fire in an apartment-house in which she lived, she alleging that there was negligence on the part of the caretaker, the defendant Dickson, and of the other defendants, the owners of the building.

The judgment was in favour of the defendants upon the answers of the jury to questions left to them.

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The plaintiff asked a reversal of the judgment or a new trial.

September 30 and October 1. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

G. A. Urquhart, K.C., for the appellant. The answer of the jury to question number 5, that there was a lack of equipment to control the fire after it started, is a finding of actionable negligence on the part of the defendants. In an apartment-house, when the fire starts on the part of the premises under the control of the owner, he owes a duty to the tenants to provide reasonable means of preventing the spread of the fire and of permitting the escape of the tenants: *Cockburn v. Smith*, [1924] 2 K.B. 119; *Musgrove v. Pandelis*, [1919] 2 K.B. 43; *Taylor v. People's Loan and Savings Corporation* (1928), 62 O.L.R. 564, reversed (1928), 63 O.L.R. 202, affirmed [1930] S.C.R. 190, is distinguishable. In addition, the behaviour of the employee Dickson in neglecting the fire, and not acting as an ordinary man would, was negligence for which the defendants the landlords are responsible. The trial Judge did not direct the jury, as he should have, that the failure to inspect the premises was negligence on the part of the absentee landlords. The trial Judge also erred in directing the jury that the onus was on the plaintiff to shew how the fire started. At common law the owners had two defences: firstly, that the fire was the act of a stranger; secondly, that it was the act of God. By the statute of Anne, which has been re-enacted in the Accidental Fires Act, R.S.O. 1927, ch. 146, a third excuse is provided, namely that it was an accidental fire. The onus, however, is on the defendants to prove the accidental origin. Reference to *City of Port Coquitlam v. Wilson*, [1923] S.C.R. 235, at p. 239; 5 C.E.D (Ont.), p. 143 *et seq.* In any event the damages are inadequate.

R. S. Rodd, for the defendants, respondents. With regard to the adequacy of appliances to prevent the spread of the fire, the jury by its specific findings has negatived all other allegations of negligence: *Curry v. Sandwich Windsor and Amherstburg Railway Co.* (1914), 7 O.W.N. 140 and 739. Having made specific allegations of negligence, which have all been met by the respondents, the onus of establishing any further negligence is upon the appellant. The statute of Anne refers to fires produced by mere chance or whose origin cannot be traced. The onus is upon the appellant to shew circumstances pointing to negligence resulting in the fire. Reference to Addison's Law of Torts, 8th ed., pp. 705-707; Beven on Negligence, 4th ed., pp. 613, 623-625; *Carstairs v. Tay-*

App. Div. 1930. *lor* (1871), L.R. 6 Ex. 217; *Higgins v. Commox Logging and Railway Co.*, [1927] S.C.R. 359.

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November 11. MIDDLETON, J.A.:—An appeal by the plaintiff from the judgment of Mr. Justice Wright, bearing date the 19th March, 1930, after the trial of the action with a jury, upon answers given by the jury to certain questions submitted to them by the trial Judge; in the alternative the plaintiff asked for a new trial on the ground of misdirection.

The plaintiff, a married woman, living separately from her husband, was tenant of an apartment in a building owned by the defendants Hubbell and Cruickshank, and of which the defendant Dickson was janitor or caretaker.

On the 6th March, 1929, a fire broke out in the basement of the building, and smoke and flame spread through the upper floors, the plaintiff was injured before she was rescued from the building, and she claims also to have lost property said to have been in her apartment and to have been stolen therefrom.

In this action by her statement of claims she alleges, para. 4, that "the basement of the said apartment-building, owing to the negligence and breach of duty of the defendants, was ignited, and, owing to the negligence of the defendants, a fire which ensued was allowed to envelop the halls and corridors of the apartment-house, and, owing to the negligence of the defendants, no warning of the fire was given to the plaintiff," with the result that she suffered the injuries complained of.

By para. 10 of the statement of claim, five specific grounds of negligence are enumerated:—

(a) In the operation of an incinerator (this is not now material).

(b) In collecting and maintaining in a closet in the basement a quantity of oily and inflammable rags.

(c) That the janitor, knowing that a fire had started, that the rooms were occupied, and that there were no fire-escapes, omitted to warn the tenants and omitted to sound the fire-alarm.

(d) That the defendants omitted and refused to come to the assistance of the plaintiff while there was time to rescue her before she had been injured.

(e) That the janitor was inefficient, and the landlords were aware of his inefficiency, and also that the landlords failed to inspect the basement properly, and that the fire was occasioned thereby.

The plaintiff claimed \$19,000 for her personal injuries and \$1,000 for the loss of goods.

In addition to a general denial, the defendants state that the fire was purely accidental, and rely upon the Accidental Fires Act, R.S.O. 1927, ch. 146.

At the hearing there was a motion for a nonsuit, but the case was finally allowed to go to the jury, and all evidence tendered for either the plaintiff or defendants was heard.

The first question submitted to the jury was: "Was the fire in question caused by the negligence of the defendants or any of them?" to which the jury answered in the negative.

The second question was as to the nature of the negligence, if any should be found.

The third question related to the quantum of damage proved. The jury assessed the entire damage at \$790.

The fourth question submitted was: "After the fire was discovered, was there any negligence on the part of the defendants in controlling the fire?" To which the answer was: "The defendants were unable to properly control the fire owing to the fact that they did not have adequate equipment to control the fire, such as stand-pipe and hose, fire-pails, ladders, and fire-extinguishers."

On these answers the learned trial Judge dismissed the action, and from this the appeal is now taken.

It is to be observed that the answer to the fourth question is based upon a theory nowhere suggested in the statement of claim, either in the general allegations in the 4th paragraph, or in the more detailed particulars given in the 10th paragraph, and there is really nothing in the evidence upon which this finding could be based.

Furthermore, the finding does not justify the maintenance of the action, for there is no duty on the part of the defendants to supply fire-escapes or fire-fighting equipment, either at common law or by virtue of any statute. This aspect of the case need not be further considered.

The plaintiff, upon the appeal, mainly relied upon the contention that, the fire having taken place upon the defendants' premises, the defendants were liable unless they proved affirmatively that the fire was accidental in the sense that it arose without any negligence on the part of the defendants, or upon the theory that the onus was upon the defendants to prove that no negligence on their part caused the fire, upon the principle of *res ipsa loquitur*. It was said, in support of this contention, that the way the case was presented by the Judge to the jury, particularly his ruling that the onus was upon the plaintiff to establish the negligence alleged, prejudiced the plaintiff. In the end all this discussion is, I think, quite beside the mark, as no admissible

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evidence was rejected, the whole case went to the jury, and the finding of the jury is that the fire did not arise from the negligence of the defendants.

I know of no case in which a new trial has been directed because of an erroneous ruling as to onus, when in the result the whole case of both plaintiff and defendant has been fully placed before the jury, and the jury have experienced no difficulty in determining the issue. I do not say that no such case can arise, but clearly the present case does not fall within any exception to the general rule.

In the second place, the plaintiff here has not relied upon any general allegation of negligence, but has chosen to define specifically the negligence and breach of duty of the defendants under the five heads enumerated in para. 10. In all these matters it is quite plain that the onus is upon the plaintiff to support the charges made. No matter what the situation might have been had another course been adopted, here the onus very plainly was upon the plaintiff.

It is to me exceedingly unsatisfactory if a case falls to be determined upon the precise form of the pleadings, and I have for that reason very carefully investigated the whole subject with a view of seeing whether the plaintiff, in any aspect of the case, could fairly be deemed to be entitled to any relief.

Mr. Urquhart's argument can, I think, fairly be stated thus. At common law the owner of property was liable for any injury caused to an adjacent proprietor by a fire originating upon his premises. He was allowed to excuse himself from this liability by establishing that the fire was caused either by the act of a stranger or by an act of God. By the statute of Anne he was further allowed to excuse himself by shewing affirmatively that the fire did not originate by his negligence. I find myself in entire disagreement with his argument.

The common law prior to the statute of Anne has been assumed to have been strongly against the owner of the premises upon which a fire originated, but the statements sometimes rather recklessly made are found to have very slender foundations. The truth is that prior to the passage of the statute in question the common law was in a state of flux. The principle applicable to the case in hand had not crystallized; and, although in some cases the liability of the owner of the land was stated in very wide terms, this was not universally accepted, and upon investigation it is found to be based upon the liability which arises where the owner himself or by his servants has intentionally ignited a fire for his own purposes and negligently failed to guard it safely, the standard phrase in

the declaration being "*ignem suum tam negligenter custodivit.*" In none of the cases is there any trace of any such liability being imposed upon one who is not the author of the fire, but himself the victim thereof.

The strongest statement in support of the claim is that found in Rolle's Abr., Action sur case, B.2, which in modern English reads: "If a fire lights suddenly in my house, I knowing nothing of it, and it burns my goods, and also the house of my neighbour, an action on the case lies against me by him." This was by no means generally accepted as the law at that time. Most of the decisions, on being investigated, are found to be based upon the principle that many years later became recognised as the doctrine of *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330, based upon the duty cast upon the owner of land, who, for his own purposes, brought the dangerous element upon the land and failed to exercise due care. In fact, in some of these cases, as I shall shew, there is a most singular anticipation of that doctrine couched in words singularly like those used in this leading case.

A dictum of Lord Tenterden, C.J., in the case of *Becquet v. MacCarthy* (1831), 2 B. & Ad. 951, which has since then been very freely quoted, always with approval, gives his view as to what the early law was (p. 958): "By the law of this country before it was altered by the statute 6 Anne ch. 31, sec. 6, if a fire began on a man's own premises, by which those of his neighbour were injured, the latter, in an action brought for such injury, would not be bound in the first instance to shew how the fire began, but the presumption would be (unless it were shewn to have originated from some external cause) that it arose from the neglect of some person in the house"—thus shewing that the old law simply cast the onus upon the defendant, and that, on satisfying the onus, he escaped from liability.

A land-owning Parliament, by the statute in question, rudely disturbed the slowly crystallizing common law, and for a time produced new difficulties. The Act was one "for the better preventing Mischiefs that may happen by Fire." By the preamble it is recited that "many fires here lately broke out in several places in and about the cities of London and Westminster . . . and many houses have frequently been burned and consumed before such fires could be extinguished, to the impoverishing and utter ruin of many of her Majesty's subjects, the rage and violence whereof might have been in great part prevented, if a sufficient quantity of water had been provided in the pipes lying in the streets," etc., etc.; and it was enacted that pipes should be laid with fire-cocks, with distinctive marks upon the walls of the

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houses shewing their location, and each parish was required to keep a large engine and hand engine and leather pipe. Watermen were to serve compulsorily and houses were to have proper foundation-walls of brick and stone.

It was then said (sec. 3): "And whereas fires often happen by the negligence and carelessness of servants;" and it was then enacted that if any menial or other servant, through negligence or carelessness, shall set fire to any dwelling house, the careless servant shall forfeit and pay the sum of £100 to the churchwardens to be distributed among the sufferers from the fire, and in default he shall stand committed to a workhouse or house of correction for 18 months, there to be kept at hard labour.

Having regard to the wages which were paid in those days, and the value of £100, the severity of this enactment can be appreciated.

The real gist of the enactment is, however, found in the very tentative section 6, which provides that no action shall be maintained or prosecuted against any person in whose house or chamber any fire from and after the 1st May, 1707, shall accidentally begin. This section was to be in force for three years only, unless continued, but it has been continued, and is now found in modified form in our Revised Statutes.

This collation of the exemption of the landowner and the punishment of the servant induces Holdsworth (History of English Law, vol. 3, p. 385) to treat the whole question of liability for fire as a branch of the law of master and servant. If the master employed the servant, he was responsible for any act done by the servant, and the damage caused thereby, for he was under a legal duty with regard to acts which were obviously dangerous. "One of the most important of these cases was the liability for damage by fire. The law imposed a duty upon all householders to keep their fires from damaging their neighbours. Hence if a fire arose in a house by the act of any of the servants or guests, and damage was caused to the houses of others, the owner was liable. He could only escape from liability if he could shew that the fire had originated from the act of a stranger."

Through all these cases it is most significant that the Judges always speak of the fire as the fire of the landowner—his fire—that is a fire caused intentionally by the defendant, although it may have developed to a conflagration quite beyond his control.

In this connection the case of *Vaughan v. Menlove* (1837), 3 Bing. (N.C.) 468, is of peculiar interest. The defendant had constructed a hay-rick without having the hay properly cured. The result was spontaneous ignition. The accused had full know-

ledge of the particular risk arising from the condition of the stack, and said he would "chance it." A fire took place, the neighbours' property was injured, and the action resulted. It was said to be a case of first impression, and the defendant was, as a result, held liable, Chief Justice Tindal stating (p. 474): "There is a rule of law which says you must so enjoy your own property as not to injure that of another; and according to that rule the defendant is liable for the consequences of his own neglect; and though the defendant did not himself light the fire, yet immediately, he is as much the cause of it as if he had himself put a candle to the rick."

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Park, J., says (p. 476): "For the fire in his field was his fire as well as that in his house; he made it, and must see that it did no harm, and must answer the damage if he did. Every man must use his own so as not to hurt another; but if a sudden storm had risen which he could not stop, it was matter of evidence, and he should have shewn it."

The statute of Anne, like our own statute, is expressed in wide terms. No owner of land is to be made liable for the consequences of an accidental fire. Blackstone thought that this secured the owner of the land complete immunity unless the fire was intentional, but this view, although obtaining some judicial sympathy, did not ultimately prevail, for in *Filliter v. Phippard* (1847), 11 Q.B. 347, Chief Justice Denman and his colleagues determined that an "accidental fire" does not include a fire which had its origin in negligence, but is confined to the case of a fire "produced by mere chance, or incapable of being traced to any cause" (p. 357) — a view which has been ever since universally accepted.

The result is unquestionably satisfactory from the practical standpoint, although it probably had its origin in an erroneous view of the Legislature as to the true common law rule. The effect of the decision is clearly stated in many works, for example Beven on Negligence, 4th ed., p. 626: "The effect of the statute may be stated as changing the onus, and limiting the class of acts importing legal wrong; or as a declension from the highest degree of diligence to that required of a prudent man in the provident conduct of his business." On p. 624: "The effect of this decision is to require the plaintiff affirmatively to shew negligence before he can recover; unless, indeed, the facts are such as to raise an inference of negligence."

I would also refer to the comparatively recent case of *Musgrove v. Pandelis*, [1919] 1 K.B. 314, affirmed in the Court of Appeal (1919), 88 L.J.N.S. K.B. 915, and particularly to the judgment of Lord Justice Bankes, and to the discussion in that case of when

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the fire referred to in the statute may be said to "accidentally" begin. When a fire is lighted by the owner in such a way that normally there would appear to be no danger, e.g., a fire in a fireplace, and by some misadventure the fire which would normally occasion no danger becomes out of hand, for example by a coal falling upon a carpet, is the fire to be regarded as an accidental fire having its origin in negligence as of the moment when it was lit in the grate, or as of the time when it escaped from the grate and ceased to be intentional, and became a source of danger through that which might be described as the accident? The view is put forward that the latter time is that to be regarded, and the negligence is to be considered then. If this principle is sound, it is of great importance in the case now in hand.

In the judgment in this case, as in fact in many places, there is much to shew that by many the common law has been stated with too great severity.

I would refer to two articles, one by Professor Winfield, "The Myth of Absolute Liability," 42 L.Q.R. 37, particularly p. 46 *et seq.*, and an article upon "Liability without Fault," by Dean Thayer in 29 Harvard Law Review, p. 801; also to expressions of opinion by Sir Frederick Pollock in his work on "Torts," 13th ed., pp. 507, 518 *et seq.*

I have delayed discussing the actual facts of this case till this point, so that it may be seen how far short the case falls from what is necessary to impose liability upon the defendants.

On the day in question the janitor, on visiting the basement, noticed, according to his account, smoke coming from a cupboard under the stairs. He opened the door and found a small spot of fire apparently in some rags immediately beside a receptacle containing a quantity of floor-wax. Realising that this wax was in a dangerous position, he attempted to remove it, but at that moment it burst into flame, and he was compelled to drop it upon the floor. The tin contained about 25 lbs. of wax, and this immediately burst into flame and smoke, which passed through the whole building. He did alarm the inmates of the house, and did his best to avert disaster. Some attempt was made to suggest that the fire had its origin in spontaneous combustion in oily rags stored in the cupboard. This case was not made out. The only rags shewn to have been stored were rags which had been used for cleaning windows, which had been dipped into a substance called "Bon Ami," said to be a mild abrasive mixed with washing soda or something of that description. This could not possibly bring about spontaneous combustion. What was the cause of the fire is an undisclosed mystery. On this evidence the fire, if it is to be regarded as of its origin

when in the cupboard, was clearly incapable of being assigned to any cause, and therefore an accidental fire within the definition, and if the time when the negligence is inquired into is when the wax was spilled upon the floor, and the fire became out of control, yet more plainly was it accidental.

At the hearing an endeavour was made to prove that the fire did not originate in this way, but was occasioned by the negligence and improper conduct of the janitor in attempting to heat the wax, so as to render it more fluid and easy to use. This attempt is based upon admissions said to have been made by the janitor. These admissions would be evidence against him, but not against his co-defendants, who were probably the only men of substance, and this issue was apparently that which the jury felt called upon to try. The verdict must be taken to be an adoption of the story told on behalf of the defendants.

The owners of the building were never in such a position that that fire could be said to be their fire, nor was it a dangerous thing brought by them upon their premises for their own purposes. They, as well as the plaintiff, were the victims of a disaster for which they have not been shewn to have been responsible.

In any aspect of the case, the plaintiff has failed to place liability upon the defendants.

I should mention that I have not overlooked the statements made by Mr. Justice Duff in the case of *City of Port Coquitlam v. Wilson*, [1923] S.C.R. 235. I do not think that in the result there is anything that I have said in conflict with his opinion there expressed.

The appeal fails and must be dismissed with costs.

MAGEE and GRANT, J.J.A., agreed with MIDDLETON, J.A.

HODGINS, J.A.:—Appeal from the judgment of Wright, J., after a trial with a jury.

The fire which gave rise to this action was clearly, in my view, an accidental fire, and the defendants, as owners of the premises in which it originated, are protected from an action for damages by the Accidental Fires Act, R.S.O. 1927, ch. 146, due to such a fire: *Gaston v. Wald* (1860), 19 U.C.R. 586.

But if, after a fire starts accidentally and evidence is given which shews negligence or some breach of a duty arising out of the circumstances due to the progress of the fire which causes or produces loss and damage to an individual or his property, there is nothing in the statute that prevents recovery—*Bigras v. Tasse* (1917), 40 O.L.R. 415; *City of Port Coquitlam v. Wilson*, [1923]

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App. Div. S.C.R. 235; *Musgrove v. Pandelis*, [1919] 2 K.B. 43. The onus
1930. however in this matter is on the plaintiff.

I think there is no evidence such as would be sufficient to over-
come the bar created by the statute, and would dismiss the appeal
with costs.

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MULOCK, C.J.O., agreed with HODGINS, J.A.

Appeal dismissed.

[APPELLATE DIVISION.]

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HULME V. CREELMAN.

Nov. 11.

Negligence—Motor-vehicle upon City Highway—Traffic-signals—Injury to and Death of Pedestrian — Finding of Jury—Evidence—Recklessness of Deceased—Wording of Question Submitted to Jury—Highway Traffic Act, secs. 13(3), 42—Failure of Motorist to Sound Horn—Judge's Charge.

In an action, brought under the Fatal Accidents Act, to recover damages for the death of the plaintiff's husband, resulting from an accident at the intersection of two city streets, the jury answered in the negative the question, "Has the defendant satisfied you that the accident . . . was not caused by any negligence or improper conduct on his part?" The jury added a recommendation that pedestrians should be compelled to obey traffic-signals.

The defendant was driving his motor-car northerly upon S-avenue; the deceased was proceeding on foot westerly on the north side of Q-street. At the intersection the traffic is regulated by signal-lights. The signal was in favour of the defendant, and he proceeded to cross Q-street, travelling at a reasonable rate of speed. Just as the defendant reached the north crossing, the deceased ran across the road, contrary to the signal, past some men standing upon the road, and directly into the side of the defendant's car, his head coming in contact with the door-handle. The blow thus received resulted in his death:—

Held, that the slight difference between the wording of the question answered by the jury and the terms of sec. 42 of the Highway Traffic Act, R.S.O. 1927, ch. 251, was not of substantial importance, nor did it cause any miscarriage of justice.

2. The defendant in his examination for discovery said that when he found the light with him he looked straight ahead and did not look to his right along Q-street—he did not see the deceased and knew nothing of him until he heard the impact on the side of the car. There was conflicting evidence as to what actually occurred, which was fully explained to the jury in a careful charge by the trial Judge:—

Held, that the finding of the jury indicated plainly that they accepted the defendant's version, and it was open to the jury to find him blameless.

When the driver of a motor-vehicle has the signal-lights with him he knows that they are against pedestrians crossing his path, and he has a right to expect that the signals will be obeyed by them. He must use every precaution to avoid an accident, but he is not in all cases to be regarded as negligent because he fails to observe negligent conduct of a pedestrian.

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Swadling v. Cooper (1930), 46 Times L.R. 597, referred to.

3. Section 13(3) of the Act requires every motor-vehicle to be equipped with an alarm-bell, gong, or horn, which shall be sounded whenever necessary to notify pedestrians of the vehicle's approach:—

Held, that there was no obligation upon the defendant to sound his bell or horn here, as there was no indication of jeopardy or peril to any one.

AN appeal by the plaintiff from the judgment of WRIGHT, J., pronounced at the trial of the action with a jury on the 29th May, 1930, by which, upon the strength of the answers by the jury to certain questions submitted, the action was dismissed without costs.

In the action the plaintiff sought to recover, under the Fatal Accidents Act, damages sustained by herself and children by reason of the death of her husband upon a city highway, as the result of his impact with the defendant's motor-car.

October 3. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, JJ.A.

T. Delaney, for the appellant.

W. C. Davidson, K.C., for the defendant, respondent.

November 11. The judgment of the Court was read by MIDDLETON, J.A.:—The unfortunate accident occurred at the intersection of Queen-street and Spadina-avenue, in Toronto. The defendant was driving his car northerly upon Spadina-avenue. Edwin Hulme, the deceased, was proceeding westerly on the north side of Queen-street, apparently in a hurry to keep an appointment with a dentist. At the intersection of Queen and Spadina the traffic is regulated by signal-lights. Prior to the accident the lights indicated to the defendant that he should proceed northerly crossing Queen-street, and he accordingly did so. His car, upon the weight of the evidence, was travelling at a reasonable rate of speed. One witness, however, alleges that the car was going very fast, possibly between 25 and 30 miles per hour. Just as the defendant reached the north crossing, Hulme ran across the road, contrary to the signal, past some men standing upon the road, and ran directly into the side of the defendant's car, his head coming in contact with the door-handle. The blow thus received resulted in the death.

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The first question submitted to the jury was: "Has the defendant satisfied you that the accident in question was not caused by any negligence or improper conduct on his part?" The jury answered this in the affirmative. Although no other question was answered, the jury added a rider recommending "that pedestrians should be compelled to obey traffic signals."

The notice of appeal is couched in most vague and unsatisfactory terms, but upon the argument the somewhat numerous complaints as to the course of the trial narrowed themselves substantially to the following:—

First, it is said that the questions submitted to the jury did not follow the terms of the Highway Traffic Act, R.S.O. 1927, ch. 251. The jury was asked whether the defendant had satisfied them that the accident "was not caused by any negligence or improper conduct on his part." The statute (sec. 42) casts the onus upon the defendant of proving that the loss or damage "did not arise through his negligence or improper conduct."* The attention of the learned trial Judge was not drawn to the slight difference in the wording of the statute and the wording of the question, and I cannot believe that this variation was of very real or substantial importance, or that it caused any miscarriage of justice.

The next objection is based upon a statement made by the defendant in the course of his examination for discovery, which was quite properly read at the trial and discussed with him. He said that when he found the light with him he looked straight ahead and did not look to his right along Queen-street. He saw the group of men standing upon the pavement apparently waiting for him to pass. He went past them, did not see the deceased, and knew nothing of him until he heard the impact on the side of the car. Complaint is made that the Judge ought to have directed the jury that on the defendant's own statement he was guilty of negligence causing the accident. This whole matter was fully explained to the jury, and the Judge pointed out to the jury that it was for them to consider this evidence and to form their own opinion upon it.

The evidence of Watt, a witness for the plaintiff, was strongly against the defendant. That evidence was fully reviewed by the trial Judge to the jury. The evidence of Benton, called for the

* 42.—(1) When loss or damage is sustained by any person by reason of a motor-vehicle on a highway, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor-vehicle shall be upon the owner or driver.

defendant, also an eye-witness, gave a different version of the occurrence, strongly corroborating the defendant's story. He, like Hulme, was going westerly on Queen-street. He reached the crossing before Hulme did. He stepped out on the pavement the instant the light changed against him, and apparently went forward with a number of others a few feet. He observed the approaching car and stopped to let it pass. At the moment of his passing Hulme ran quickly from behind the standing group right into the car. The opposing views of the parties and the evidence in support of each were fully explained to the jury in a very accurate and careful charge, and the finding of the jury indicates plainly that the jury accepted the defendant's version of the occurrence. I cannot regard the evidence which I have referred to as conclusively indicating that the defendant was at fault. It was open to the jury to hold him blameless.

A careful perusal of the evidence satisfied me that the unfortunate accident arose from the carelessness of the deceased, who failed to obey the traffic-signal and blindly rushed to his own destruction. The jury apparently so thought, for its rider is significant. When the driver of a motor-vehicle has the signal-lights with him he knows that the signal-lights are against pedestrians crossing his path, and he has a right to expect that the signals will be obeyed by them. This does not mean that he must not use care if he observes negligent conduct on the part of a pedestrian. He must take every precaution to avoid an accident, but he is not in all cases to be regarded as negligent because he fails to observe the negligent conduct of the injured pedestrian. A warning note against carrying the idea of ultimate negligence too far is sounded in the recent important decision of the Lords in *Swadling v. Cooper* (1930), 46 Times L.R. 597.

The next objection was based upon the failure of the defendant to sound his horn at the intersection. No such obligation is cast upon the driver of a car by the Highway Traffic Act. Section 13(3) requires every motor-vehicle to be equipped with an alarm-bell, gong, or horn, which shall be "sounded whenever it shall be reasonably necessary to notify pedestrians or others of its approach." Here nothing has been shewn to exist which would make it reasonably necessary for the operator of the car to sound his horn. The signal to proceed had been given to him and it was his duty to proceed. The signal to those crossing the street had been given and it was their duty to wait until the north-bound traffic had passed. Everything appeared to be normal and safe. The westerly traffic had apparently stopped, a group of men were plainly waiting for the cars to pass. There was nothing to

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App. Div. indicate danger, but this unfortunate man, apparently utterly
1930. reckless, rushed past the waiting group into the side of the car.
HULME He was unseen by the driver and could not have been seen unless
v. the driver had looked in a direction at right angles to that in which
CREELMAN. he was travelling. Unless every driver is to sound his horn at
Middleton, every crossing even when there is no indication of jeopardy or
J.A. peril to any one, there was no obligation to sound his horn here.
In fact he would have been guilty of an offence had he done so,
for the statute prohibits him from sounding the horn "so as to
make an unreasonable noise."

The learned Judge drew attention to the fact that the horn had not been sounded, and told the jury it was for them to determine whether it was reasonably necessary to sound it. He drew attention to the other charges made: that the defendant did not keep a proper look-out; that he was travelling at too high a rate of speed, etc.; and asked the jury if any of these things existed, and if they existed did they cause the accident? The findings of the jury must be taken to negative the plaintiff's contention.

I can see no reason for interfering with the finding in this case and would dismiss the appeal with costs.

Appeal dismissed.

[APPELLATE DIVISION.]

MUIR v. SARNIA BRIDGE CO. LTD.

1930.

Nov. 11.

Negligence—Death of Hirer of Derrick by Fall of Mast upon him—Negligence of Employee of Defendant Company Lent with Derrick to Hirer—Agreement of Hiring—Employee Becoming Temporary Employee of Hirer—Non-liability of Company.

The defendant company hired to M. a derrick and one of its employees, F., who was to take part in the erection of the derrick. After the derrick had been erected upon M.'s premises, a test as to its efficiency was attempted to be made, in the course of which a cable broke, the derrick fell to the ground, and the mast struck and killed M. In an action by the widow and child of M. against the company to recover damages for his death, it was found that F. was guilty of negligence which caused M.'s death; but it was *held*, that, as the defendant company did not contract to erect the derrick itself, but placed F. under M.'s control for the purpose of the work, he became the servant of M., and his negligence was not the negligence of the defendant company.

Donovan v. Laing Wharton and Down Construction Syndicate, [1893] 1 Q.B. 629, *Société Maritime Française v. Shanghai Dock and Engineering Co. Ltd.* (1921), 90 L.J.P.C. 85, and *A. H. Bull & Co. v. West African Shipping etc. Co.*, [1927] A.C. 686, followed.

AN appeal by the defendant company from the judgment of the County Court of the County of Lambton (TAYLOR, Co. C.J.), in favour of the plaintiffs, after trial, without a jury, of an action, brought under the Fatal Accidents Act, to recover damages sustained by the plaintiffs, the widow and infant child of Johnson Gregory Muir, whose death was caused, as the plaintiffs alleged, by the negligence of one French, an employee of the defendant company, whereby a derrick fell upon and killed Muir.

October 13. The appeal was heard by MULLOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

T. N. Phelan, K.C., and N. L. LeSueur, for the appellant company, contended that it did not own and did not supply the defective cable. Assuming that French did act in a negligent manner, the company is not liable for his acts of negligence, he being under Muir's control for the purpose of the work. He was the general servant of the company, being hired and paid by it, but he was lent to Muir so as to become his servant for the erection of the derrick. The power of control is the test of liability: *Bain v. Central Vermont Railway Co.*, [1921] 2 A.C. 412; *A. H. Bull & Co. v. West African Shipping etc. Co.*, [1927] A.C. 686, at p. 691; *Samuels v. Townsend* (1916), 32 Times L.R. 356; *Société Maritime Française v. Shanghai Dock and Engineering Co. Ltd.* (1921), 90 L.J.P.C. 85. The agreement between the appellant company and Muir provided that Muir was to have "the use of the

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man." This clearly shews that the appellant company did not have the power of control at the moment of the accident. The fact that Muir could not discharge French is not material, for that is always the case where a man, who is for general purposes the servant of one person, is lent for a particular occasion to another: *Moore v. Palmer* (1886), 2 Times L.R. 781; *Rourke v. White Moss Colliery Co.* (1877), 2 C.P.D. 205. French did not occupy a position as superintendent of the company; he was merely a labourer. In any event the amount of damages awarded is excessive.

A. G. Slaght, K.C., for the plaintiffs, respondents, contended that French was acting in the capacity of superintendent during the course of the erection of the derrick and while the test was being made. It was upon his insistence that the defective cable was used. By the terms of the agreement between the company and Muir, the company was to supply a derrick and a man to supervise the erection thereof. According to *Waldock v. Winfield*, [1901] 2 K.B. 596, the company should be held liable for the negligent acts of its servant while the servant was supervising the erection of the derrick. Muir was billed for French's wages. The power of control, in respect of French, never passed from the company. It alone could dismiss him. The case of *Rourke v. White Moss Colliery Co.*, *supra*, may be distinguished from the present case because of the fact that there was an express agreement in that case with respect to who should have the control of the servant. There was no such agreement here. Reference to *Moore v. Palmer*, *supra*; *Dewar v. Tasker and Sons Ltd.* (1907), 23 Times L.R. 259.

November 11. The judgment of the Court was read by MULOCK, C.J.O.:—This is an appeal from the judgment of his Honour the Judge of the County Court of the County of Lambton.

The action is to recover damages because of the death of Johnson Gregory Muir, husband of the plaintiff Mildred Hawkins Muir and father of the plaintiff Elizabeth Jane Muir, under the following circumstances: Muir was president and manager of the Muir & O'Sullivan Dredge and Dock Company, and required the temporary use of a derrick wherewith to do certain pile-driving at Kocatz Distilleries, in the town of Sarnia. The defendant company owned a derrick, which at the moment was dismantled and lying on the ground at the premises of the Dominion Salt Company in Sarnia, and for the purpose in question hired to Muir the derrick and one of its employees, a man named Dennis French, who was to take part in the erection of the derrick.

When erected and fit for use, five guy-cables were necessary, and the defendant company supplied four of them; the fifth was obtained from a junk-pile, but it was not owned or supplied by the defendant company. When the derrick was erected and the five cables were anchored, a test as to its efficiency was attempted to be made, and for that purpose the load-line cable was attached to the top of the mast and passed through a block at the outer end of the boom and was hooked to the hammer, a block of steel lying on the ground and weighing $2\frac{1}{2}$ tons. The hoisting engine was started, took in the slack of the load-line cable, and had raised the hammer partly from the ground when the fifth cable broke, and in consequence the derrick fell to the ground, the mast striking and killing Muir.

The case sought to be made by the plaintiffs is to the effect that the cable which broke was, to the knowledge of the defendant company, unfit for the purpose for which it was being used; that the agreement between the defendant company and Muir was that the defendant company was to erect the derrick; that it undertook such erection, and appointed French, its servant, to superintend the erection; that French knew that the defective cable was unsuitable, and that he was guilty of negligence in using it; that he gave orders to the engineer to raise the hammer, and the engineer acted upon his orders; that French was guilty of negligence in giving such orders; and that the defendant company was answerable for his negligence.

Although there is some conflict of evidence as to the ownership of the defective cable and as to French's knowledge of its condition, and as to whether he gave orders to the engineer to apply the power to raise the hammer, I think the evidence shews that the defendant company did not own and did not supply the defective cable, that French knew it was defective, and with this knowledge was guilty of negligence in using it as a guy for the mast, and that he gave orders to the engineer to apply the power when the load-line cable was hooked to the hammer. Thus, he was guilty of negligence which caused Muir's death, and the question is whether the defendant company is liable for his negligence. This depends upon what was the real agreement between the parties.

The defendant company says that French was hired to Muir for his own purposes only, namely, to shew Muir or his men how to assemble the derrick. The plaintiffs say that he was hired to Muir to superintend the erection of the derrick, and that whilst so engaged he was acting solely as a servant of the defendant company. The onus was on the plaintiffs to prove that the agreement was to the effect claimed by them.

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The following is the substance of the evidence adduced on their behalf respecting the nature of the agreement:—

(1) An entry in the "contract" book of the defendant company on the 15th November, 1927, worded as follows, "Muir & O'Sullivan Dredge & Dock Company 3459, Port Huron. Rental of derrick including use of man to superintend erection."

(2) Account dated the 6th January, 1928, rendered by the defendant company to Muir & O'Sullivan Dredge & Dock Company in the following words and figures, "To employee's time for the erection of derrick, our contract number C3459.....\$40."

(3) Evidence from the examination of French at the inquest into Muir's death:—

"Q. On the 12th November what were you working at? A. I erected the derrick.

"Q. Where were you working? A. At the distillery.

"Q. Who for? A. I was working for the Sarnia Bridge Company.

"Q. What was your job? A. They sent me out there to erect the derrick for Mr. Muir."

At the trial French said that the answer to question 4 was wrong, that he was sent to help Muir to erect the derrick; he also swore that he told Muir that the defective cable was unfit for use, that Muir told him to use it, and that he did so on Muir's instructions. The learned trial Judge disbelieved the evidence given by French at the trial.

(4) Benjamin Manderville, foreman of Muir's company, swore that French was in charge of the erection of the derrick and gave orders in connection with the work; that the defective cable was used by French's orders; that French directed the test in question to be made; that Muir took no part in erecting the derrick and gave no instructions;

(5) Anthony Thomas, Muir's engineer, swore that he got orders from French to raise the hammer; that Muir gave no orders; that French himself selected the defective cable from the junk heap, and that he, the witness, told French it was defective and not fit to be used.

(6) Archibald Charles McArthur swore that he was working on the job and took his orders from French; that Muir gave no orders and took no part in superintending the job; and that French gave the orders to start the engine.

For the defence, J. Sculpholm, manager of the defendant company, swore that about two weeks before the accident Muir had telephoned and asked what the defendant company would charge to supply, set up, the derrick at the distillery and take it away;

that later he gave him a price, and that later Muir said it was too high.

Roy M. Norton, president of the defendant company, swore that whatever arrangement was made with Muir respecting the derrick was made with him; that Muir told him "our price to erect it was too high and that he would erect it himself;" that Muir asked him if he had a handy man who could shew him how to assemble the derrick, and Norton told him that he probably could find one, and that his erection foreman was away; that Muir then ordered the derrick and asked him for a man capable of erecting it to superintend the work, and Norton told him he had no man capable of taking that responsibility. Norton also swore that French was not sent to take charge of the erection; that no such arrangement was made with Muir; and that the erection was left entirely to Muir.

James G. Ferguson, contractor, of Port Huron, swore that he had quoted a price to Muir to erect a derrick for him; that Muir did not accept his offer, and that about an hour and a half before the accident he saw Muir—the derrick then being erected—when Muir said his price was high and he was able to erect it himself cheaply.

Casimir Kocot, general manager of the distillery where the derrick was erected, swore that French was attaching a guy to his building; that he was on the roof, and that Kocot ordered him off, but that French would not leave, whereupon he complained to Muir, who ordered him off, and that French then left. He also swore that a couple of days before the accident, in conversation with Muir, he took exception to the manner in which the derrick was being erected and told him some one might be killed, whereupon Muir said that for 20 years he was in that business and knew what he was doing.

Charles Andrew Reid, shop superintendent of the defendant company, swore that it was he who gave instructions to French to go with the derrick, and that his instructions were to go with it and help. He also swore that about the 13th November Muir called him upon the telephone and said we were to supply a man to help him to put the derrick together, and that he would be ready for the man next morning, and that we then sent French.

With reference to the entry in the "contract" book, the evidence establishes the fact that the agreement was made between Muir and Norton, the president of the defendant company; that Norton verbally communicated its tenor to the manager Sculpholm, and that Sculpholm communicated it verbally to the clerk who made the entry. The clerk who made the entry was not

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called. The evidence shews that different clerks made entries in the "contract" book, and there is no evidence to shew what clerk made the entry in question.

According to Norton's evidence, the entry does not correctly express the agreement made with Muir nor the account of it which he gave to Sculpholm. The latter also says that it does not correctly express his instructions to the entry-clerk. The learned Judge accepted the entry as shewing the real nature of the agreement in question, but in view of the evidence I am of opinion that in this respect he erred. This entry was the foundation for the wording of exhibit 6, "To employee's time for the erection of derrick," and therefore, by the like reasoning, exhibit 6 does not correctly express the agreement between the parties.

With reference to French's evidence at the inquest, that they sent him there to erect the derrick, but which at the trial he changed to the effect that he was sent to help Mr. Muir, it is to be observed that the defendant company was not represented at the inquest, and that the evidence of French given there was not evidence against the company in this action. At the trial French swore that his instructions were to help Muir. The trial Judge has not seen fit to accept his evidence at the trial, but its rejection does not make his testimony at the inquest evidence against the defendant company. The learned trial Judge accepted the evidence of Manderville, McArthur, and Thomas that French took charge of the erection, gave orders, selected the wires, etc.

Accepting, as I do, the learned Judge's acceptance of the evidence of these three witnesses, their evidence throws no light upon the nature of the agreement between the parties. Even if French took full charge and control of the work, that would not be evidence that the defendant company agreed with Muir that French was, with respect to the erection of the derrick, to be its servant and to have complete control. The onus was upon the plaintiffs to prove that such was French's position, and I think there is no evidence to establish that contention. It is true that French, whilst taking part in the erection of the derrick, was, in a general way, the servant of the defendant company; still, before the defendant company can be held liable for his acts of negligence, it must, I think, be established that the defendant company contracted to do the work, French being subject to the defendant company's orders. If the defendant company, instead of contracting to erect the derrick itself, placed French under Muir's control for the purpose of the work, he became for that purpose the servant of Muir's company, and his negligence therefore would not be the negligence of the defendant company.

In determining the question of liability of one person for the negligence of another in the performance of work, Lord Dunedin, in *Société Maritime Française v. Shanghai Dock and Engineering Co. Ltd.*, 90 L.J.P.C. 85, says (p. 86): "No one circumstance is a complete test. Payment and the power to dismiss are cogent circumstances, and often help to determine the question, but neither circumstance is conclusive. Their Lordships are of opinion that the law on the matter was accurately laid down by Bowen, L.J., in the case of *Donovan v. Laing Wharton and Down Construction Syndicate*. His Lordship there said (63 L.J. Q.B. 25, at pp. 27, 28; [1893] 1 Q.B. 629, at pp. 633-4): 'We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act. That was the test laid down by Crompton, J., nearly forty years ago, in *Sadler v. Henlock* (1855), 4 E. & B. 570, in the form of the question, 'Did the defendants retain the power of controlling the work?' Here the defendants certainly parted with some control over the man, and the question arises whether they parted with the power of controlling the operation on which the man was engaged. There are two ways in which a contractor may employ his men and his machines. He may contract to do the work, and, the end being prescribed, the means of arriving at it may be left to him. Or he may contract in a different manner, and, not doing the work himself, may place his servants and plant under the control of another—that is, he may lend them—and in that case he does not retain control over the work . . . I have only to add that I agree that no difference can arise whether the lending of the servant to another person is in consideration of some reward or not. Such a distinction obviously cannot affect the reasoning on which I have based my judgment."

In *A. H. Bull & Co. v. West African Shipping etc. Co.*, [1927] A.C. 686, at p. 691, Lord Shaw of Dunfermline says: "Their Lordships think it only necessary to refer to *Donovan v. Laing Wharton and Down Construction Syndicate*, [1893] 1 Q.B. 629, for a clear exposition of the question to whom attaches responsibility for the act of a servant transferred, so to speak, for the convenience of working a chattel lent or hired to another. In a sense, that is to say in a general sense, he is the servant of the master who sends him, but upon the practical point of responsibility when he is doing the work under the orders or control of the other employer to whom he is sent, he is, in the eye of the law, the servant of the latter, and the latter is, in the eye of the law, his employer."

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I am of opinion that the plaintiffs have failed to shew that the agreement between the defendant company and Muir was to the effect that in the performance of the work of erecting the derick French was to superintend it and be subject to the defendant company's orders, and therefore the defendant company is not liable for French's negligence.

The action fails, and this appeal should be allowed with costs, and the action dismissed with costs.

Appeal allowed.

[APPELLATE DIVISION.]

1930.

McWHIRTER v. CREBER.

Nov. 11.

Partnership—Dissolution—Liability of Retiring Partner upon Promissory Note—Acceptance of other Partner as Sole Debtor—Finding against Agreement to Do so—Appeal—Release—Consideration—Giving Time by Acceptance of New Note.

The judgment of RANEY, J. (1930), 65 O.L.R. 389, was affirmed.

Held, that the finding of fact that there was no agreement, either express or to be inferred from the course of the dealings between the plaintiff and the new firm, that the retiring partner should be discharged from existing liabilities, could not, upon the evidence, be reversed.

In the absence of circumstances which would create an estoppel, an intelligent intention to change the position is essential.

In re European Assurance Society, Conquest's Case (1875), 1 Ch. D. 334, followed.

It is not conceivable that the plaintiff intended to abandon the liability of one partner and to rely solely on the liability of the other, receiving no additional security. This would not be a novation—and, *semble*, it would be nothing but a release and void for lack of consideration.

The giving of time by the acceptance of the new note did not operate to discharge the retiring partner from liability, for the plaintiff had no knowledge of the fact that the retiring partner, as between himself and his former partner, had become only secondarily liable.

Rouse v. Bradford Banking Co. Ltd., [1894] A.C. 586, and *Goldfarb v. Bartlett and Kremer*, [1920] 1 K.B. 639, followed.

AN appeal by the defendant George Creber from the judgment of RANEY, J. (1930), 65 O.L.R. 389.

October 17. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

G. T. Walsh, K.C., for the appellant, argued that the evidence shewed that the \$2,000 advanced by the plaintiff was a loan to Frank Creber personally. The appellant was not liable on the dissolution of the partnership for the repayment to the plaintiff of this sum. The acceptance by the plaintiff from Frank Creber,

trading under the firm name of Creber Bros., of a new note, securing not only the new advance but the amount due for the old advances, discharged the appellant, the retiring member of the old firm: *Lindley on Partnership*, 8th ed., pp. 292 and 301; *Royal Bank of Canada v. Hogg* (1929), 64 O.L.R. 653; *Russell v. Arnold* (1922), 53 O.L.R. 114; *Rouse v. Bradford Banking Co. Ltd.*, [1894] A.C. 586; *Evans v. Drummond* (1801), 4 Esp. 89; *Port Darlington Harbour Co. v. Squair* (1859), 18 U.C.R. 533; *Bryce v. Davidson* (1866), 25 U.C.R. 371; *Blew v. Wyatt* (1832), 5 C. & P. 397; *Dominion Sugar Co. v. Warrell* (1927), 60 O.L.R. 169; *Watson Manufacturing Co. v. Bowser* (1911), 21 Man. R. 21. The plaintiff after the 1st May, 1926, accepted Frank Creber as sole debtor, and on his bankruptcy proved her claim against him on the promissory note signed by him and then held by her. There was a novation; the retiring partner was discharged, and the evidence shewed an agreement inferred as a fact from the course of dealing between the parties.

Baird Ryckman, for the plaintiff, respondent, contended that there was no agreement to discharge the appellant from liability. The plaintiff never intended to abandon any of her rights against him. Reference to *In re European Assurance Society, Conquest's Case* (1875), 1 Ch. D. 334, 344. Nor did the acceptance of the new note discharge the appellant. Reference to *Heath v. Percival* (1720), 1 P. Wms. 682; *Bottomley v. Nuttall* (1858), 5 C.B.N.S. 122; *Spenceley v. Greenwood* (1858), 1 F. & F. 297; *Lindley on Partnership*, 8th ed., p. 291.

November 11. The judgment of the Court was read by MIDDLETON, J.A.:—An appeal by the defendant George Creber from the judgment of Mr. Justice Raney pronounced on the 22nd April, 1930.

Frank H. Creber and George H. Creber carried on business in partnership under the name, style, and firm of Creber Bros. from May, 1917, until the dissolution of the firm in April, 1926. A certificate of dissolution was registered on the 2nd September, 1926, and at the same time a certificate under the Partnership Act was registered, shewing the intention of Frank Creber to carry on business alone under the name of Creber Bros.

Prior to the dissolution of the firm, the plaintiff had lent to it \$2,000, secured by promissory notes. After the dissolution of the firm, she lent to Frank Creber, trading under the same name, two sums of \$500 each. The plaintiff knew of the dissolution of the firm and of the fact that Frank was trading in this way, and no claim is here made for the moneys advanced after the dissolution. The contention of the appellant is, that the transac-

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tions between the plaintiff and Frank Creber, with knowledge of the dissolution of the firm, operated to release the retiring partner, George H. Creber. At the trial the learned Judge found that George H. Creber was not released and gave judgment against him accordingly. From this judgment the present appeal is taken.

What is now argued is, that the plaintiff, having accepted a promissory note from Frank Creber, trading under the firm name of Creber Bros., securing not only the new advance but the amount due for the old advances, discharged the retiring member of the old firm.

The learned trial Judge thought that the case was governed by the provisions of the Ontario Partnership Act, sec. 18(3), which provides that a retiring partner may be discharged from any existing liabilities by an agreement to that effect between himself and the members of the firm as newly constituted and the retiring member, this agreement being either an express agreement or to be inferred as a fact from the course of the dealings between the creditor and the new firm, such agreement amounting to a novation: *Cluff v. Norris* (1909), 19 O.L.R. 457. Upon the facts proved in the case in hand the learned Judge found that there was no such agreement.

After careful consideration, we see no reason for differing from this finding of fact. The plaintiff's husband was a trusted employee of the firm of Creber Bros., and she undoubtedly knew of the change in the firm in a general way. There is nothing to indicate that she knew anything of the terms of the dissolution. While she knew that Frank Creber was continuing business under the old name, she did not know that he had agreed to assume payment of the debts, and that, as between the two partners, Frank was the one primarily liable. For the new advances she relied upon Frank's credit alone, but for the old advance she thought she had the liability of George as well. When the new advance was made, she accepted a note signed in the old firm name by Frank, and surrendered the old note, but I am quite satisfied that she did not intend to prejudice her right to claim the old advance from George. George was no party to this transaction, and the plaintiff certainly never intended to abandon any of her rights against him. In the absence of circumstances which would create an estoppel, it seems to me plain that an intelligent intention to change the position is essential. I would quote from the opinion of Lord Justice Mellish in *In re European Assurance Society, Conquest's Case*, 1 Ch. D. 334, at pp. 344, 345:—

"The question for the jury would be whether A. had, *ex animo*. intended to take, and agreed to take, the liability of B. in lieu of the liability of C. . . . There has always appeared to me to

be a great difficulty in making one case of this class a precise precedent for another; for when we are considering whether, *ex animo*, a party has assented to a thing, the position of the person himself becomes material."

Quite apart from the consideration of any legal difficulties, and considering solely the question whether Mrs. McWhirter intended to abandon the liability of the one partner and to rely solely upon the liability of the other, I cannot conceive of her doing so. It is much easier to find an intention to abandon the liability of an outgoing partner, when this is accompanied by the assumption of liability by an incoming partner, than to assume such an intention where the creditor gives up the one and receives in exchange no additional security. This is not a novation, and there is or appears to be some ground at least for contending that it is nothing but a release and void for lack of consideration.

In Lindley on Partnership, 8th ed., p. 289, it is stated: "An agreement by a creditor of several persons, liable to him jointly, to discharge one or more of them, and look only to the others, is not necessarily invalid for want of consideration." It is to be noted that this speaks of agreements where the liability is joint and not joint and several; and, further, the case of *Lyth v. Ault* (1852), 7 Ex. 669, there cited, is no authority for the proposition, what was there decided being that "the acceptance by a creditor of the sole and separate liability of one of two or more joint debtors, is a good consideration for an agreement to discharge all the other debtors from liability;" Chief Baron Pollock saying: "The sole responsibility of one of two joint debtors may be more advantageous than their joint responsibility, and certainly they are two very different things." This is elaborated by Parke, B., who points out the difference: If, while the liability is joint, you sue one, he may embarrass you by pleading in abatement the non-joinder of his co-contractor, and in the case of bankruptcy there would be a difference in the mode of proof and if one should die you would lose your remedy at law against him and have to resort to equity to reach his estate. This was before the passage of the Mercantile Law Amendment Act, now R.S.O. 1927, ch. 161, sec. 4, and before the merger of the courts of law and equity. It may now be that there is no difference, and therefore no consideration. This need not be further discussed, as the finding of fact, which is the essential thing, is in the plaintiff's favour.

Mr. Walsh did not argue that the giving of time by the acceptance of the new note operated to discharge his client from liability; that it did not do so is plain, for the plaintiff had no knowledge of the fact that George Creber had become only secondarily liable as between himself and Frank. See *Rouse v. Bradford Banking*

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Appeal dismissed with costs.

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[APPELLATE DIVISION.]

1930.

INDUSTRIAL ACCEPTANCE CORPORATION LTD. v. CODE.

Nov. 12.

*Sale of Goods—Conditional Sale—Default—Repossession and Resale—
Notice of Intention to Resell—Non-compliance with Conditional
Sales Act, R.S.O. 1927, ch. 165, sec. 7 (2).*

The notice of sale required by sec. 7 (2) of the Conditional Sales Act to be given to the purchaser of goods under a conditional sale contract, where the seller intends to look to the purchaser for any deficiency on a resale of the goods, must be notice of a definite proposed sale, not merely notice of an intention to sell.

A notice that, failing to receive payment of the amount due to the holder of the security before a certain hour of a certain day, the holder would sell the goods covered by the security, was *held* not to comply with sec. 7 (2); and an action against the purchaser under the conditional sale contract, for the deficiency after a resale to a new purchaser, was dismissed.

IN this action, brought in the County Court of the County of Essex, the plaintiff corporation claimed from the defendants \$561.80, being the amount of the defendants' alleged indebtedness to the plaintiff corporation under the terms of a contract dated the 19th March, 1929, between the defendants Harris and Landon and the defendant Code for the conditional sale and purchase of an automobile for \$2,013, which contract was, on the same day, assigned by the defendants Harris and Landon to the plaintiff corporation. Under the terms of the contract and assignment thereof the defendants Harris and Landon guaranteed the payment of the purchase-price to the plaintiff corporation. Certain payments were made under the terms of the contract, but the defendant Code became in default in his payments, and the plaintiff corporation repossessed the automobile, and having, as it alleged, given due notice to the defendant Code, as required by law, did, on the 23rd December, 1929, sell the automobile for the net price of \$954.50, leaving a deficiency, payable under the terms of the contract, of \$561.80.

The defendant Landon pleaded that the plaintiff corporation failed to give the defendant Code the statutory notice of the intended resale; and that he (Landon), as an original guarantor of the defendant Code, was entitled to the security which the plaintiff corporation held as against the defendant Code, and that the plaintiff corporation, having parted with that security and

lost its right to relief against Code, was not entitled to any relief as against Landon.

The defendant Code's statement of defence was to the same effect.

The notice given by the plaintiff corporation was dated the 24th September, 1929, addressed to the defendant Code, and read as follows:—

"This is formal, final notice that failing to receive your remittance in the amount of \$1,863 before the close of banking hours, 3 p.m., Thursday, October the 10th, we shall sell, by public auction or private sale, Hupmobile sedan serial No. A120595, which was purchased from W. Harris and C. Landon.

"In the event of the amount of the sale being not sufficient to cover the balance on the note, you will be held liable for the deficiency."

The County Court Judge (Ross) dismissed the action, after trial without a jury, saying:—

The right of the plaintiff corporation to get any deficiency in case of resale is statutory, and the plaintiff corporation must comply strictly with the conditions imposed by the statute to be entitled to it.

In my opinion the notice in this case is not such a compliance with sec. 7, subsec. 2, of the Conditional Sales Act, R.S.O. 1927, ch. 165, as would entitle the plaintiff so to recover: see *Motor-Car Loan Co. v. Bonser*, [1928] 3 D.L.R. 875.

The plaintiff, had he given the proper notice, could have held the defendant Code. Not doing so, he released the guarantors of Code, the other defendants.

The plaintiff corporation appealed from the judgment of the County Court.

November 12. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

G. L. Fraser, for the appellant corporation.

W. D. Roach, for the defendants, respondents.

Thomas Brooks & Son v. Drury (1927), 60 O.L.R. 192, was referred to.

THE COURT, giving judgment at the conclusion of the argument, referred to sec. 7(2) of the Conditional Sales Act, which reads, "Where the purchase-price of the goods exceeds \$30. and the seller or lender intends to look to the purchaser or hirer for any deficiency on a resale of the goods, they shall not be resold until after notice in writing of the intended sale has been given to

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 1930. it required notice in writing of *the intended sale* to be given, and
 not merely notice of an intention to sell; and so the notice given
 INDUSTRIAL was insufficient, as the County Court Judge had found. The
 ACCEPTANCE CORPORATION LTD. *Bonser case, supra*, was directly in point.

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Appeal dismissed with costs.

[IN CHAMBERS.]

1930.

RE BOWYER.

Nov. 25.

Lunatic—Confinement in Hospital for the Insane—Motion for Discharge on Return of Habeas Corpus—Hospitals for the Insane Act, secs. 6, 7, 8, 26, 29—Certificates of Qualified Medical Practitioners—Actual Existence of Insanity—Immorality a Symptom—Evidence—Danger to Community—Female Refugees Act, secs. 8, 9, 11.

A woman of 22 years, confined in a provincial hospital for the insane, by virtue of two certificates of legally qualified medical practitioners, as required and provided by the Hospitals for the Insane Act, R.S.O. 1927, ch. 353, secs. 6-8, applied, upon the return of a writ of *habeas corpus*, for an order for her discharge from such confinement. The return shewed that she was of inferior mental capacity, was oversexed, and was the mother of two illegitimate children:—

Held, that, while the statutory certificates are essential to the validity of the detention, and any defect in compliance with the requirements of the statute is fatal, it is not necessarily the duty of the Court to order a discharge where there is any defect: if, on the whole material, it is shewn that insanity exists, the Court should stay its hand; if it is doubtful whether there is in fact such a mental condition as to justify further detention, an issue as to sanity should be directed.

Regina v. Pinder (1855), 24 L.J.Q.B. 148, and *Re Gibson* (1907), 15 O.L.R. 245, applied.

To invoke the power of the Court to discharge, there must be satisfactory evidence of the sanity of the applicant; and, upon the evidence before the Court, having regard especially to the history of the applicant, she must be regarded as insane and a danger to herself and the community if allowed to be at large.

Mere immorality is not insanity, but here the immorality is a symptom of the insanity which undoubtedly exists.

Reference to the provisions of the Female Refugees Act, R.S.O. 1927, ch. 347, secs. 8, 9, 11.

The applicant was remanded to custody.

MOTION, upon the return of a writ of *habeas corpus*, for an order for the discharge of Violet Hypatia Bowyer from confinement in the Ontario Hospital for the Insane at Cobourg, upon the ground that her detention there is illegal.

November 18. The motion was heard by MIDDLETON, J.A., in Chambers.

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RE BOWYER.

R. B. Gibson, for the applicant.

W. B. Common, for the Attorney-General for Ontario.

November 25. MIDDLETON, J.A.:—The writ is directed to Dr. Herriman, the superintendent of the Ontario Hospital at Cobourg, commanding him to produce the body of the said Violet H. Bowyer and shew the cause of her detention in the said hospital. The production of the body has been dispensed with, and a return has been made shewing that the applicant is in his custody, as an inmate of the hospital, by virtue of two certificates of legally qualified medical practitioners and accompanying statements as to family history and estate, as required and provided by the Hospitals for the Insane Act, R.S.O. 1927, ch. 353, secs. 6-8. These certificates, if in compliance with the Act, "shall be sufficient authority to any person to convey the patient to the hospital and to the authorities thereof to detain him therein" (sec. 8). And, in my opinion, the jurisdiction of the Court is limited to the single question, "Are the certificates in accordance with the Act?"

A form of certificate is prescribed and is found in the schedule to the Act. What is essential in the certificate is pointed out by sec. 7. It shall state: (1) that the medical practitioner signing it personally examined the patient separately from any other medical practitioner; (2) and, after due inquiry into all necessary facts relating to the case of the patient, found him insane. By subsec. (2), the practitioner shall also in his certificate "state the facts upon which he has formed his opinion, distinguishing the facts observed by him from the facts communicated to him by others."

It is not made essential to the validity of the certificates that the facts stated under the provisions of subsec. (2) shall, in the opinion of the Court or of any other person, be sufficient to justify the opinion formed by the medical practitioners that the patient is insane.

The authorities of the hospital are not given any authority to review or criticise the conclusion of the certifying physicians as to the mental condition of the patient. On the production of these documents the patient is received into the hospital.

After the patient is in the hospital, he may be discharged therefrom by the Lieutenant-Governor, by the inspector, or by the superintendent in accordance with the regulations (sec. 26), or he may be committed to the care and custody of his friends if this is deemed conducive to his recovery (sec. 29).

The whole scheme of the Act indicates that the legislative will is that the asylums shall be operated under a benevolent bureau-

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cracy (I use the term in no offensive sense), and that the unfortunates who become patients shall be cared for by the superintendents, watched over by the inspector, and that over all shall be the responsible Minister, symbolised by the Lieutenant-Governor, who will afford redress in exceptional cases. It has been held that the statutory certificates are an essential matter, and that which is made necessary by the statute is essential in order that there may be statutory authority for the custody of the patient.

The case of *Regina v. Pinder* (1855), 24 L.J.Q.B. 148, is based upon somewhat similar but not identical legislation, and determines that any defect in compliance with that which is required by the statute is fatal and that it is not open to the Court to enter into a discussion as to the materiality of that which is lacking, once it is shewn to be required by the statute.

But it does not follow that it is the duty of the Court then to order a discharge. If, on the whole material, it is shewn that insanity exists, the Court should stay its hand. If it is doubtful whether there is in fact such a mental condition as to justify further detention, an issue as to sanity should be directed: *Regina v. Pinder, supra; Re Gibson* (1907), 15 O.L.R. 245. It would obviously be against the public interest to set free an insane person merely because there has been some slip in the preparation of the committal papers.

It may well be that the writ of *habeas corpus* is available to discharge a person who is sane, yet is confined in an asylum. On the other hand, there is much to indicate that the decision of the authorities under the statute ought not to be interfered with by the Courts. In any case, to invoke the power of the Court to discharge, there must be satisfactory evidence of the sanity of the patient.

I seek now to apply these principles to the case in hand. It is said that the committal certificates are defective in that the grounds set forth are not sufficient to warrant the finding of insanity. As I have said, I do not regard this as open to the applicant. Then defects in form are pointed out. The only one worth mentioning is the failure to fill in the patient's name in one place, but this blank is preceded by the words "the said —," and, though the expression is elliptical, there can be no doubt as to the meaning. In *Regina v. Pinder, supra*, there was a blank left and it was fatal. No place of examination was named, and this was held to be a failure to meet a statutory requirement.

The question of sanity would arise if this objection should be regarded as fatal or if the motion should be treated as a motion to discharge on the ground of the patient's sanity. I suggested to

counsel that this might have to be dealt with upon an issue or after further examination by medical men, but both counsel stated that the case was now adequately before the Court upon the present material, and no good purpose would be served by further inquiry.

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This unfortunate young woman has a very bad family history: "three paternal uncles who are insane; one maternal uncle, unmanageable as a boy, stole and was placed in an industrial school; two paternal aunts who lived immorally, one being the mother of an illegitimate child, coloured." The mother of this young woman is, to judge from a letter to her daughter produced, unbalanced mentally, and certainly, if her character and influence are to be judged by this document, the charge made by the officers of the various organisations whose reports are before me, that "the home influences surrounding her have not been helpful but most harmful and that there has from the beginning been a lack of parental co-operation," is abundantly justified. The father is said to be erratic, and charges said to have been made against him by the girl, and indignantly denied by him, cannot be ignored. What was charged was: "One time he took her down to some house where a man was immoral with her. This he said would cure her after she had gone wrong previously." (Affidavit of Margaret Howe).

The girl has been leading an immoral life since she was 12 or 13; and, though she is only 22 years old, for 6 years she has been a public charge. One living child, born 4 or 5 years ago, is a ward of the Children's Aid Society. In September, 1928, she was convicted by Magistrate Margaret Patterson as a vagrant and sent to an industrial home for two years less a day, but, being then pregnant, she was temporarily placed in a hospital, where a child was born but died.

No good purpose would be served by recounting all the incidents of her career. She has misconducted herself with many men on many occasions. When employed in domestic service she has stayed out all night with men, and has lived with men in immoral relationship.

While in the industrial home she was carefully observed, with the result that, as the term of her incarceration neared completion, it was deemed inexpedient to grant her freedom, and she was examined and found insane by two medical practitioners, Dr. E. P. Lewis and Dr. Kathleen M. Barth. On the faith of these an order was made by the Deputy Provincial Secretary for her transfer to the Ontario Hospital at Cobourg, where she is now confined.

On her admission to the hospital she was examined with care and has been kept under observation by medical men, who deem it

Middleton, improper now to sanction her discharge. On complaint being made, she has been permitted to be examined by medical men selected by her father, and this motion is made.

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RE BOWYER. Dr. William B. Edmonds examined the patient on the 7th October, 1930, and finds her to be a high grade moron; her mental ability is not high—probably that of a normal girl of 12 years. “It is purely a case of sub-normal mental ability, and she has no mental hallucinations and is not in any way dangerous to be at large.” He was informed that her moral control is weak. “As to this I am not prepared to express an opinion.” “Judging solely by her mental capacity,” he would say that she is not insane and quite capable mentally of working successfully outside of an institution, and that she might safely be allowed her freedom under proper supervision.

Dr. Howard A. Irwin examined her at the same time and confirms Dr. Edmonds. He goes further in some respects. He found her intelligent and coherent, could carry on conversations in a normal manner and apparently capable of performing domestic work. The condition is “merely subnormal mentality.” He believes her not insane or dangerous to be at large and he could discover no reason why she should be confined as an insane or idiotic patient.

How much these medical men knew of the history of the case is not shewn, nor is it shewn whether they considered the very serious question whether this woman is now in such a mental condition that if at large she would at once inevitably resume immorality with its serious consequences to the community and to herself.

In answer there is filed a history of the case, verified by a series of affidavits from those having the patient in their custody, which I shall refer to more in detail later on, and medical evidence.

Dr. W. C. Herriman, the superintendent of the Cobourg hospital, has had her in charge 4 months. He considers “her to be a high grade feeble-minded person, definitely lacking in moral judgment and unable to protect herself in the community.”

Dr. Charlton A. Cleland, a member of the Cobourg staff, speaks of her as “a high grade moron mentally deficient, especially in the moral sphere”—superficial in thought and of defective judgment. In speaking of her past sexual misdemeanours she says she is sorry but feels it is no disgrace and will not definitely promise to do otherwise in the future. It is nobody’s business but her own if she has been a vagrant and has had two illegitimate children. In his opinion she is not capable of properly protecting herself in society.

Dr. W. A. Caldwell, also on the staff, has had her under observation daily since admission. She is a high grade moron with a mental age of 12, of very sullen morose disposition with temper tantrums, but can make her manner very pleasing when occasion requires. This is superficial and not a true picture of her daily life. "As soon as opportunity offers she will revert to a life of prostitution."

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Dr. Donald R. Fletcher, of Toronto, superintendent of the Ontario Hospital at Toronto, and demonstrator in Psychiatry in the University of Toronto, a specialist in mental cases, examined this patient on the 4th November, 1930, and describes her as "a well-built, well-nourished girl of pleasant appearance and manner." Subnormal mentally, he gives instances of her incapacity when examined. She "shewed no active symptoms of any psychotic condition." She admits sexual immorality since the age of 13 and gives no evidence that there is likely to be any change in her habits if she returns to her former environment."

Dr. Bernard T. McGhie, 13 years in the practice of Psychiatry, superintendent at various times of hospitals for the insane, including the hospital for defectives at Orillia, examined her on the 4th November. Subnormal mentality. Mentality of a 12-year old child. When examined not suffering from a psychosis. Her history shews the results that might be expected "when a physically healthy adult with such limited mentality is placed in an undesirable environment." Her mental limitations will prevent her past experience being of any value in preventing a recurrence of her difficulties should she return to her former environment.

The Deputy Provincial Secretary produces her record from the files, shewing the care with which the history of each patient is recorded. This is verified by affidavits of Miss Chestnut, superintendent of the Haven, of Margaret Hope, of St. Faith's Lodge, of Emily H. Hill, of Humewood House, who says "it would be tragic to allow the said Violet H. Bowyer to return to the home of her parents, as they are quite incapable of caring for her or controlling her conduct," of Laura L. Kennedy, superintendent of the Refuge.

The details of these histories are not material, they are sordid in the extreme. Enough has been said to indicate their nature.

Counsel for the applicant argued the case upon the footing that the girl is hopelessly immoral. Mere immorality is not insanity and does not justify detention in an asylum. I agree with the latter statement, but here I find the immorality is merely a symptom of the insanity which, in my view, undoubtedly exists. A woman who, in the language of one of the reports, is very much

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RE BOWYER. oversexed, and has only the mentality and will-power of a child of tender years to control her appetites and passions, is insane, and not only insane but also a danger to herself and to the community. That she is physically well-developed and of pleasing appearance, and when not in a psychosis can make herself attractive, only adds to the danger. The provisions of the law relating to the confinement of insane persons are by no means limited to the case of maniacs who will slay others and injure themselves, but apply as well to those unfortunates who for their own sake as well as in the interest of the community are dangerous to be at large. The argument here presented, that this girl is her own master and her body is her own to use and to abuse as she sees fit, belongs to another and past age. The community as a whole is concerned. For 6 years this woman has been a charge upon the public funds, her child is a ward of the Children's Aid Society, and liberty to resume her reckless life will mean further disaster.

I have set forth the facts with some detail, as I wish to shew that there is no foundation for the suggestion that those responsible for the administration of this branch of the law have acted unreasonably or improperly. Their task is difficult and delicate. Here patience and consideration are everywhere apparent.

To appreciate the situation one should have in mind the statutory provision for the care and supervision of those committed to an industrial refuge. The medical officer in charge must examine every inmate within 3 days after admission and every 6 months thereafter, and the superintendent must forward the report within 3 days to the inspector: The Female Refuges Act, R.S.O. 1927, ch. 347, sec. 8. A board is constituted of two medical men and the inspector himself, generally a medical man, and this board reviews the medical report in the light of the record of the patient's history, and the board may itself examine the patient and may transfer her to the Orillia Hospital or any hospital for the treatment of disease: sec. 9.

All warrants for the admission of any patient to a refuge shall be forwarded to the inspector within 3 days (sec. 11); and, as ancillary to all this, there is the power given to the Department to transfer an inmate from any institution maintained by the Province to any other institution.

The patient must be remanded to custody.

[IN CHAMBERS.]

RE I.M.

1930.

Nov. 26.

Neglected Child—Children's Protection Act, R.S.O. 1927, ch. 279, sec. 1 (g) (viii)—Order of Magistrate for Delivery to Children's Aid Society—Motion to Quash—Right of Judge in Chambers to Examine Proceedings—Judicature Act, sec. 65—Evidence Justifying Order.

An order was made by a police magistrate declaring I. M., a girl of 15 years, a neglected child, and directing that she be delivered into the custody of a Children's Aid Society:—

Held, upon a motion made before a Judge in Chambers to quash the order, that the Judge was at liberty to go into the evidence and examine the proceedings.

Re H. (1919), 16 O.W.N. 210, followed.

Semble, that the provisions of sec. 65 of the Judicature Act, R.S.O. 1927, ch. 88, first enacted in 1926 by 16 Geo. V. ch. 22, sec. 2, in consequence of the decision in *Rex v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128, were not necessary to enable the Judge to examine the proceedings.

It appearing that the girl was allowed to run the streets at night, and there being abundant evidence of her misconduct with men, the magistrate was justified in finding that she was "growing up without salutary parental control and education," within the meaning of sec. 1 (g) (viii) of the Children's Protection Act, and was a neglected child within the meaning of the Act; and the motion was dismissed.

MOTION on behalf of I.M., a girl of 15 years, for an order quashing a police magistrate's order declaring her a neglected child and directing that she be delivered into the custody of a Children's Aid Society.

November 25. The motion was heard by RIDDELL, J.A., in Chambers.

F. X. Burrows, for the applicant.

W. B. Common, for the Attorney-General for Ontario.

November 26. RIDDELL, J.A.:—The local superintendent of the Manitoulin Children's Aid Society, on the 26th September, 1930, laid an information before the Police Magistrate there, saying that "at Little Current . . . I. M. . . . is a neglected child, contrary to the provisions of the Act respecting Neglected and Dependent Children of Ontario"—the reference being, of course, to the Children's Protection Act, R.S.O. 1927, ch. 279. Thereupon a summons issued to her requiring her to appear before the magistrate on a day named, as she was "charged" with being "a neglected child, contrary to the provisions of the Act respecting Neglected Children of Ontario." The Act does not purport to forbid a child to be neglected, nor does it make it an offence in

Riddle, J.A. the child that it should be neglected; but there was no objection
1930. to information or summons; the girl and her parents appeared
RE I. M. before the Police Magistrate, and, without protest, an investigation
was proceeded with, such as is provided for by sec. 7 of the Act.
Witnesses were examined, including the girl herself, and the magistrate made an order, on the 20th October, wherein he found her a dependent and neglected child, "so as to be growing up without salutary parental control and education," and directed that she should be delivered into the custody of the Children's Aid Society of Manitoulin Island.

On the 3rd November, a notice of motion was served on behalf of the girl—she is 15 years old—asking that the order should be quashed, on various grounds set out in detail.

Upon the motion coming on before me in Chambers, the objection was taken that sec. 65 of the Judicature Act does not authorise the Judge in Chambers to go into the evidence except in the case of a conviction, and in the present case only an order is concerned.

Without expressing any opinion of my own on the point, I follow Meredith, C.J.C.P., in *Re H.* (1919), 16 O.W.N. 210, in which he went into the evidence upon a similar application, and said, "The order must be quashed" (p. 211), although, indeed, he ultimately postponed the motion, leaving the custody as it was. If this practice is not what the Legislature intended, it is easy to rectify the error by a declaratory Act. The present sec. 65 seems to have been enacted in 1926, 16 Geo. V. ch. 22, sec. 2, in consequence of the decision in *Rex v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128, but apparently its provisions were not necessary to enable me to examine the proceedings in an application like the present.

The reasons for appeal, apart from mere technicality, to which no attention need be paid, reduce down to the claim that there is no evidence that, at the time of the investigation, the girl was a neglected child within the meaning of the Act.

There is abundant evidence of her misconduct with men over and over again; and, while the witnesses do not give any instance occurring at about the time of the hearing, the evidence is very strong of her continuing to run the streets late at night, and I think the magistrate was quite justified in finding that she was "growing up without salutary parental control and education" within the meaning of the latter part of R.S.O. 1927, ch. 279, sec. 1 (g) (viii).

The motion will be dismissed with costs.

[KELLY, J.]

RE ATTORNEY-GENERAL FOR ONTARIO AND HUTESON.

1930.

Nov. 27.

Fraud—"Lunch and Lecture System"—Procuring Agreements for Purchase of Lands—Security Frauds Prevention Act, 1930, 20 Geo. V. ch. 39—Regulations Made under—Injunction.

Upon an application by the Attorney-General for an order, under sec. 12 of the Security Frauds Prevention Act, 1930 (20 Geo. V. ch. 39), enjoining the respondents from trading in securities, namely, agreements of sale and purchase of real property by means of "the lunch and lecture system," on the ground that they have been committing fraudulent acts within the meaning of that statute and regulations made thereunder:—

Held, that the purpose and intent of the Act are to prevent and put an end to dealings such as the respondents have been engaged in and such as are described below; and, therefore, the application was granted.

Transactions induced by methods which require an exorbitant commission to be paid to the agents engaged in bringing them about are the sort which the Legislature aims at curbing.

APPLICATION by the Attorney-General for an order, under sec. 12 of the Security Frauds Prevention Act, 1930 (20 Geo. V. ch. 39), enjoining the respondents, James F. Huteson and "James Huteson Organization," absolutely from trading in securities, namely, agreements of sale and purchase of real property, or interests therein upon the instalment plan, by means of "the lunch and lecture system," on the ground that the respondents have been committing fraudulent acts within the meaning of that Act and the Regulations made thereunder.

The application was heard by KELLY, J., in the Weekly Court, Toronto.

J. Sedgewick, for the applicant.

J. R. L. Starr, K.C., for the respondents.

November 27. KELLY, J.:—Section 2 (c) of the above referred to Act defines "fraud," "fraudulent" and "fraudulent act" as used in the Act. Sub-clause (iv) of clause (c) states that, in addition to their ordinary meaning, these words shall include the gaining or attempt to gain, directly or indirectly, through a trade in any security, a commission, fee or gross profit so large and exorbitant as to be unconscionable and unreasonable; and sub-clause (v) states that they shall include any course of conduct or business which is calculated or put forward with intent to deceive the public or the purchaser or the vendor of any security as to the nature of any transaction or as to the value of such security.

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By sec. 2, clause (h), "security" shall include (b) any document constituting evidence of title to or interest in the capital, assets, property, profits, earnings or royalties of any person or company, and (e) any document designated as a security by the regulations. Section 2 (f) declares that "Regulations" shall mean the regulations made from time to time by the Lieutenant-Governor in Council under the provisions of this Act. By sec. 31, the Lieutenant-Governor in Council is empowered to make, and from time to time amend, alter or repeal, regulations not inconsistent with the Act, in several respects therein set forth, including (d) for the creation of offences, and (e) for the better carrying out of the provisions of the Act and for the more efficient administration thereof; and (f) for any other purpose elsewhere indicated in the Act; and all such regulations and any amendment, alteration or repeal thereof shall become effective in all respects as if enacted in the Act upon the publication thereof in the *Ontario Gazette*.

Regulations were promulgated by order in council published in the *Ontario Gazette* on the 6th September, 1930 (p. 1642). Regulation 4 states that "security," in extension of the definition contained in clause (h) of sec. 2 of the Act, shall include (amongst other things) "agreements of sale and purchase of real property, or any interest therein upon any instalment plan where the execution of such agreements by any of the public is sought by means of what is known as 'the lunch and lecture system.'"

Subsection 1 of sec. 12 of the Act is as follows:—

"The Supreme Court or any Judge thereof is hereby empowered upon the application of the Attorney-General, where it is made to appear upon the material filed or evidence adduced that any fraudulent act, or any offence against this Act or the Regulations has been, is being or is about to be committed, may by order enjoin*

"(a) any registered broker, company or salesman or any person or company implicated with any of them in the same matter from trading in any security whatever absolutely or for such period of time as shall seem just, and any such injunction shall *ipso facto* suspend the registration of any registered person or company named in the order during the same period, or

"(b) any person or company from trading in any security whatever, or in any specific security, or from committing any specific fraudulent act or series of fraudulent acts absolutely or
• for such period of time as shall seem just."

The respondents carried on business in Toronto and its suburbs in the sale of, and procuring of agreements for the sale of, lands

* This sentence is faithfully copied from the statute-book. It is suggested that the words "is hereby empowered" should be omitted.

in the township of York, by means of "the lunch and lecture system," one of the principal features whereof is to search for and get into communication with persons who can be induced or persuaded to participate in a drive around Toronto and then attend a luncheon in a place near the lands intended to be sold, all provided at the expense of the respondents; immediately following which the respondent Huteson, or an assistant or employee of the respondents, delivers a "lecture" to the luncheon guests, expatiating upon the wonders of Toronto and the financial opportunities of purchasing real property therein or nearby. Then such of the "guests" as can be prevailed upon are induced to make contracts for the purchase of vacant lands of which the respondents are the selling agents. Persons are employed, chiefly women if one may judge from the language of the "Model Solicitation" hereinafter referred to, who are therein called the Invitational Committee, whose duties are to get into communication with possible purchasers. The purpose of the method of making sales adopted by the respondents may readily be inferred from a perusal of the "Model Solicitation," which contains their instructions to the members of the Invitational Committee. This document assumes that the employee will acquire, either through a neighbour or one of her friends or by means of a telephone or directory listing, the name of a person upon whom a call is to be made, and who, it may also be inferred, is preferably to be a woman. The instructions proceed to direct the Invitational Committee member to approach the woman in a friendly and familiar manner and assure her that the speaker has been sent to her with a very personal message, and then to ask to be allowed to enter her home; and if that be refused the incident is to be ignored and the Invitational Committee member is to continue in the same "congenial manner." At this stage the instructions are to speak to the woman (referred to as Mrs. Martin) as follows: "The secretary of the James Huteson Organization has asked me to extend to you an invitation to be their guest to-morrow, at 11 o'clock, on a scenic trip through the city in a closed car in charge of a very careful driver, also for a very delicious luncheon which will be served to a few of the representative ladies of your neighbourhood, and afterwards to have the pleasure of listening to Mr. Huteson talk. Mr. Huteson is a very unusual character. He is a lecturer who is known from coast to coast and gives a very interesting talk covering the things which every wideawake citizen of our city should know—its past and great future possibilities. In addition to that, you will be intensely interested in that part of his lecture which refers to success, why we succeed and why we fail in life, and how to get

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the most out of life. Really, if I were to present you with a ticket which were to cost you \$5, Mrs. Martin, you could well afford to pay me for this invitation."

Mr. Huteson, the "very unusual character" whom the person so addressed is urged to hear talk "on things which every wide-awake citizen of the city should know—its past and great future possibilities"—is a comparatively recent arrival in Toronto.

The "Model Solicitation" instructs the Invitational Committee member to pay particular attention to the "Don'ts" which it contains, such as: "Don't fail to get on a common ground with the person to whom you are speaking," etc. "In this way you are able to get Mrs. Martin's confidence and you will be able to learn sooner or later something about her personality, the finances of the family, and in turn to qualify this person as to her ability to purchase real estate." "Don't, under any circumstances, talk real estate. Don't refer to real estate any more than is absolutely necessary. Don't talk prices or location of the property."

If the person so sought out is induced to go on the drive and to attend the luncheon and the lecture, other employees (salesmen) of the respondents are immediately on hand to do what further is necessary to have the person—who has not been seeking to buy vacant land and perhaps up to that stage has been reluctant to do so—enter into a contract of purchase, and a deposit is procured from her, usually 36 per cent. of the purchase-money, that being the commission the respondents receive for procuring a purchaser and making the sale; though it is stated in the evidence of one of the purchasers that she believed at the time that what she then paid was the total purchase-price of the lot, whereas, it has turned out, it was only 36 per cent. of the price later insisted upon, she appearing not to have understood the document which she signed and which did not state or indicate what was the total purchase-money.

It is evident that the purpose and intent of the Act are to prevent and put an end to dealings such as the respondents have been engaged in; and, while some of the provisions of the Act and of the Regulations are not happily worded, their language is nevertheless broad enough and definite enough to include land sale transactions brought about by the methods in use by the respondents. There can be no question as to the character of the respondents' dealings and their methods in use in procuring purchasers. The evidence—particularly the written material which has come from their possession—leaves no doubt that they have been carrying on business by methods which the Act and the Regulations declare to be improper—methods which tend to impose upon, mislead, or deceive the unwary.

While on these grounds alone (I find it unnecessary to rely on other grounds), I am of opinion that the relief asked by the applicant should be granted against the respondents, reference may also be made to the commissions which the respondents receive for making these sales. It has been argued that that is a matter between them and the vendors of the property; but who will or can say that the very high commission, or in any event a substantial part of it, does not find its way into the selling price, thus enhancing the price to the purchasers? It may be that 36 per cent. is the usual charge for making sales by such methods as were employed by the respondents, or where unusual efforts are necessary to induce, cajole, or force reluctant, unwilling, or inexperienced persons to buy that which they do not desire to buy. It seems to me that transactions induced by methods which necessitate so exorbitant a commission are the sort which the Legislature aims at curbing.

I have quoted at some length from the respondents' own documents and literature, because I think it is in the interests and for the protection of the class of persons with whom the respondents aim to deal that these documents and literature should be made public.

The application is granted, with costs against the respondents.

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[IN BANKRUPTCY.]

RE WIGGINS LTD.

1930.
Nov. 27.

Broker—Purchase of Shares for Company on Margin—Deposit of Bonds as Collateral Security in Lieu of Cash—Repledge of Bonds by Broker—Subsequent Bankruptcy—Trustee in Bankruptcy—Obligation to Return Bonds.

In October, 1929, R. instructed W. Ltd., stockbrokers, to purchase upon margin certain shares of mining companies for him; he was advised by the brokers that he would be required to maintain a one-third margin on these purchases; it was arranged, however, that he should deposit with the brokers certain bonds as collateral in lieu of a cash margin. On the 30th January, 1930, and again on the following day, he tendered to the brokers payment in full of his account and asked for delivery of the shares and the return of his collateral, but failed to get them. On the 1st February, the brokers made an authorised assignment in bankruptcy. The brokers had pledged the shares purchased for R. and the collateral bonds, and on the 28th February the trustee sold the shares for a price which left a credit balance in favour of R. It appeared that the bonds were, by agreement, to be pledged for no greater amount than one-third of the purchase-price, and the brokers had pledged them for a greater sum:—

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—
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Held, that the bonds, being in the hands of the trustee, must be returned by him to R.
Haggart v. Trusts and Guarantee Co. Ltd. (1930), 65 O.L.R. 23, applied and followed.

AN application on behalf of Edward Blake Robertson for an order directing the return to him of three \$1,000 Dominion Government, 1943, 5 per cent. bonds, deposited by him with the bankrupt company, Wiggins Ltd.

The application was heard by GARROW, J., sitting as Bankruptcy Judge.

Lewis Duncan, for the applicant.

H. A. Aylen, for the authorised trustee in Bankruptcy.

November 27. GARROW, J.:—On the 28th October, 1929, Robertson instructed Wiggins Ltd., who were stockbrokers, to purchase for his order, upon margin, 100 shares of Noranda Mines Ltd., and, on the 29th October, 100 shares of Teck Hughes Gold Mines Ltd. and 100 shares of Shertritt Gordon Mines Ltd.

At the time of the purchase, Robertson was advised by Wiggins Ltd. that he would be required to maintain a one-third margin on these purchases, and Wiggins Ltd. stated that they would accept Dominion Government bonds as collateral in lieu of one-third cash margin; and, in pursuance of this arrangement, the Government bonds referred to were deposited with Wiggins Ltd.

Robertson in his affidavit states that at the time it was understood that the collateral was to be retained only until such time as the stock was sold or paid for and delivery taken.

Subsequently, on the 4th November, 1929, Robertson took delivery and paid for the 100 shares of Shertritt Gordon.

On the 30th January, 1930, he tendered to Wiggins Ltd. payment in full of his account and asked for delivery of the stocks and his collateral, but was told that the stocks were in Toronto, and that they would be telegraphed for. On the 31st January, he again tendered payment, but failed to get the stocks.

On the 1st February, Wiggins Ltd. made an authorised assignment.

Exhibits "D" and "E," referred to in the affidavit of Robertson, are monthly statements sent by Wiggins Ltd. to Robertson on or about the 31st December, 1929, and the 1st February, 1930, respectively.

Robertson says that he did not at any time agree that his bonds were to be pledged for any greater amount than one-third of the purchase-price of the stock held in his name, plus interest and plus any depreciation between purchase-price and market-price.

It appears that Wiggins Ltd. did pledge the stocks purchased and the collateral security, and on or about the 28th February the trustee sold the applicant's shares of Noranda for about \$4,160 and his shares of Teck Hughes for about \$600, leaving a credit balance in favour of the applicant of \$105.32. The applicant now demands, in view of this fact, that his collateral securities be returned to him, these securities being now in the hands of the trustee.

I can see no sufficient grounds upon which this claim can be resisted. The applicant relies upon the case of *Haggart v. Trusts and Guarantee Co. Ltd.* (1930), 65 O.L.R. 23; S.C., *sub nom.* *Haggart v. Trustee of Heron*, 11 C.B.R. 163. The trustee, on the other hand, refers to *Re Bryant Isard & Co., Ex p. Fair* (1922), 22 O.W.N. 402, 2 C.B.R. 471, and *Re Bryant Isard & Co., Ex p. Turner* (1925), 28 O.W.N. 269, 436, 5 C.B.R. 793.

In my opinion, the case is completely covered by the first mentioned authority. It was there held by Orde, J.A., that securities pledged with Heron as collateral had been wrongfully and fraudulently repledged by him, that they had been pledged by the plaintiff to Heron for a specific purpose, and the latter had no right to repledge them for any sum in excess of the plaintiff's indebtedness to him, and that, once the plaintiff's debt to Heron was paid, Heron could have no property whatever in the shares, and the plaintiff therefore became entitled, as against Heron and therefore as against his creditors, to the redelivery of the security. In that case, as in this, there was some kind of intimation endorsed on some of the documents delivered by the broker to the customer, indicating a reservation of a right to repledge for a larger amount than the actual balance owing, although in this case, in the receipt signed by Wiggins for the collateral bonds, all that is reserved is a right of pledging or raising money upon all or any stocks, bonds, etc., received from or held on account of customers as collateral securities for loans or when carried against margins.

This was not signed by Robertson, and his own evidence, which apparently is not contradicted, is to the effect that the bonds were to be pledged for no greater amount than one-third of the purchase-price, as already stated.

In my opinion, the applicant is entitled to succeed and is entitled to have delivered to him the bonds in question, and is also entitled to his costs out of the estate.

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MARTIN V. RIMAN.

Dec. 3.

Bankruptcy—Proposal for Composition—Acceptance by Creditors—Guaranty of Payments—Approval by Court—Exception as to Clause in Proposal—Variation of Contract—Prejudice of Guarantor—Release—Bankruptcy Act, secs. 13, 14, 16, 17, 18.

After an authorised assignment had been made by R. under the Bankruptcy Act to the plaintiff, who was appointed trustee, R. submitted to her creditors a proposal in writing for an extension of time. The proposal contained a clause (5) providing that upon the approval of the extension by the Court the assignment should be annulled and R.'s assets be revested in her free from the assignment and from all the estate and interest of the trustee. The defendant, by an instrument in writing under seal, guaranteed the performance of the terms and conditions of the proposal and covenanted with the trustee to pay the moneys payable under the proposal in the event of R. failing to pay. This instrument contained a clause stating that it expressed the entire and final agreement between the parties to it, and that any alteration, amendment, or qualification thereof should be null and void and should not be binding upon the party charged unless made and recorded by a memorandum in writing signed by the party to be charged. The proposal was accepted by the creditors; the trustee applied to the Court for an order approving of the composition agreement; and such an order was made by the Registrar in Bankruptcy, but it contained a clause saving and excepting clause 5 from the approval given. R. made default in the payments stipulated for in the proposal, and the trustee brought this action against the defendant (guarantor) for the amount due:—

Held, that the agreement made by the proposal of R. and its acceptance by the creditors was so altered or modified by the Court order that the defendant was relieved from his guaranty.

The Bankruptcy Act contains no provision which enables the Court to modify or change the proposal—it must either approve or reject the same.

Sections 13, 14, 16, 17, and 18 of the Act considered.

It appeared that R., the debtor, assented to the modification, and thereby became bound to carry out the terms of the composition agreement, but there was no evidence that the defendant knew or approved of the change; and it was manifest that the change was or might be prejudicial to the defendant.

Holme v. Brunskill (1877), 3 Q.B.D. 495, *Bolton v. Salmon*, [1891] 2 Ch. 48, and *Egbert v. National Crown Bank*, [1918] A.C. 903, applied and followed.

The action was dismissed, but without costs, the successful defence not having been specially pleaded.

IN this action the plaintiff sued the defendant upon a guaranty contained in a document under seal, executed by the defendant under date of the 25th March, 1929.

The action was tried before WRIGHT, J., without a jury, at a Toronto sittings.

H. A. Goodman, for the plaintiff.

G. T. Walsh, K.C., for the defendant.

December 3. WRIGHT, J.:—The history of the transaction resulting in the agreement may be stated as follows:—

On the 18th February, 1929, one C. Riman, trading as Riman's General Store, at the town of Napanee, made an authorised assignment under the Bankruptcy Act to the plaintiff.

On the 4th March, the debtor submitted to the creditors a proposal for an extension of time. The material clause in the said proposal reads as follows:—

"5. That upon the approval of the extension by the Court the aforesaid assignment made by me be annulled and my assets be revested in me free from the said authorised assignment and from all the estate, right, title, and interest of the trustee therein or thereto."

On the 25th March, 1929, by an instrument in writing under seal of that date, the defendant entered into an agreement with the plaintiff, whereby, among other things, he covenanted as follows:—

"1. The party of the first part" (the defendant) "hereby guarantees that the debtor will duly carry out and perform the terms and conditions of the proposal for composition hereto annexed and covenants to and with the trustee that in the event of the said debtor failing to pay the moneys due and payable under the said proposal or any part thereof he the said party of the first part shall forthwith pay the same to the said trustee, his heirs, executors, administrators, and assigns."

Another important clause, numbered 3 in the document, reads as follows:—

"3. This indenture expresses the entire and the final agreement between the parties hereto with respect to all the matters herein; and its execution has not been induced by, neither do any of the parties hereto rely upon nor regard as material, any representations or promises whatsoever (except as hereinbefore expressly set out), and it shall not be altered, amended, or qualified by any act or omission or by the conduct of any of the parties hereto or otherwise howsoever save and except by a memorandum in writing signed by the party hereto to be charged; and any alteration, amendment, or qualification thereof shall be null and void and shall not be binding upon the party to be charged unless made and recorded as aforesaid."

On the 15th April, 1929, the plaintiff applied to the Court for an order approving of the said composition agreement, and such an order was made by the Registrar in Chambers, but it contained the following material clause: "The said composition is hereby approved save and except paragraph 5 of the said proposal."

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After this order was made, the plaintiff delivered to the debtor the assets vested in the former by the authorised assignment, and the debtor proceeded to carry on business until the month of December, 1929, when two creditors, one of whom had been inspector under the previous assignment, filed a petition for a receiving order, and on the date mentioned a receiving order was made, whereby the debtor was adjudged a bankrupt. The debts in respect of which the petition was filed were contracted subsequent to the delivery of the assets to the debtor. Under the order the present plaintiff was constituted custodian of the estate of the said debtor.

The debtor made default in the payments stipulated for in the proposal already referred to, and this action is now brought against the defendant for the payment of the amount due.

Several defences were set up, but I am of the opinion that the decision of the case rests upon one ground of defence, which is taken only in a general way in the statement of defence, although argued very strenuously by counsel for the defendant at the trial.

This contention is in effect that the agreement which is evidenced by the proposal made by the debtor and the acceptance of the same by creditors, or by the plaintiff on behalf of the creditors, was so altered or modified by the Court order that the defendant was relieved from his guaranty.

It will be noted that in the proposal contained in paragraph 5, made by the debtor, there was an express provision that the assets in connection with the business should be revested in her free from the said authorised assignment and from all the estate, right, title, and interest therein or thereto.

While the agreement of the 25th March, 1929, recites that this proposal, which is attached to that agreement, was accepted by the creditors, yet in the order purporting to approve of the same it is distinctly provided that paragraph 5 of the said proposal is not approved. In other words, the Court order alters or modifies the proposal made by the debtor and accepted by the creditors, and thereby varies the original contract.

By secs. 13, 14, 16, 17, and 18, of the Bankruptcy Act provision is made for the approval by the Court of the proposal, and it is also provided that the Court may in certain circumstances refuse to approve the proposal, but there is no statutory enactment to which I have been referred which enables the Court to modify or change the proposal. There is a provision in subsec. 1 of sec. 13 for the alteration or modification of the proposal by the creditors at the meeting. This must necessarily be with the approval of the debtor, but there is no provision enabling the Court to vary the proposal. It must either approve or reject the same.

It would appear, however, from the evidence in this case, that the debtor assented to the modification, and thereby became bound to carry out the terms of the composition, but there was no evidence that the defendant as guarantor either knew or approved of or consented to the change.

I am of opinion that the change effected by the order of the Court goes to the very basis of the contract and materially varies or alters the original agreement. In dealing with contracts of guaranty, the Courts have always regarded the position of a surety as one to be guarded carefully, and where there is a change in the basis of the contract between the debtor and the creditor which may affect the position of the surety to his prejudice, such change will be held to operate as a discharge of the latter, unless he consented to the change, which consent would virtually amount to a new contract.

The judgment of Cotton, L.J., in *Holme v. Brunskill* (1877), 3 Q.B.D. 495, 505, 506, enunciates the principles applicable to this case in the following terms:—

“The true rule . . . is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged.”

This statement of the law was followed in *Bolton v. Salmon*, [1891] 2 Ch. 48, and is quoted with approval by Lord Dunedin in *Egbert v. National Crown Bank*, [1918] A.C. 903; see pp. 908 *et seq.*

I think the principles of these decisions apply directly to the facts in this case. There is no evidence that the defendant knew or approved of the change in the agreement between the debtor and the creditors, although it was strongly contended by the plaintiff's counsel that from the fact that the debtor resided in the same

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house with the defendant I should infer knowledge on the part of the latter as to the change in the agreement. It was also contended that the same solicitor acted for both the debtor and the guarantor, and therefore knowledge of the alteration should be inferred as against the defendant.

The defendant, however, in his evidence testified that he had no solicitor in connection with the matter, and there is no evidence that the same solicitor acted for the debtor and the defendant. I cannot accede to the argument of the plaintiff's counsel that the defendant should be held to have known and to have approved of the change, or to have agreed to remain liable under the agreement as varied.

It is manifest that the change was or might be prejudicial to the defendant. The proposal contemplated the annulment of the assignment and also the revesting of the assets in the debtor, and if these provisions were carried out the debtor would be placed in a much more advantageous position to carry on business and pay off her indebtedness which the defendant guaranteed. This view brings the case within the authorities already cited.

It follows from what I have already stated that, by reason of the modification or variation of the original agreement, the defendant is discharged as surety.

Several other defences were raised by the defendant, but I do not consider it necessary to discuss them, as the defence already considered is, in my opinion, sufficient to dispose of the action.

I have already stated that the defence upon which the case is decided was not set forth specifically in the statement of defence, although strongly relied upon by the defendant's counsel at the trial; and, while the action is dismissed, it will be without costs.

[APPELLATE DIVISION.]

1930.

REX v. KOVACH.

Dec. 5.

Criminal Law—Indictment for Murder—Defence — Drunkenness — Insanity not Pleaded—Intent—Judge's Charge—Verdict of Guilty of Murder—Misdirection—Nondirection—Benefit of Reasonable Doubt —Inclusion of Reduction of Crime to Manslaughter—Miscarriage of Justice—New Trial.

The prisoner was indicted for the murder of a police officer. There was no doubt that the prisoner fired the fatal shot. The only defence was that he was so drunk as to be incapable of forming an intent, and therefore at most was guilty only of manslaughter.

The Judge presiding at the trial, in his charge to the jury, instructed them thus: "What you must determine is if this man can shew

that his mind was so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous and so likely to inflict serious injury. That is your test. If upon the whole evidence you feel honestly that this man was drunk to the extent that he did not know what he was doing was dangerous and likely to cause serious injury, then the offence ought to be reduced to manslaughter, but that is for you."—

Held, that this was misdirection.

Insanity was neither pleaded nor attempted to be proved; but the Judge applied the statutory defence of insanity provided by sec. 19 of the Criminal Code, while the law regards drunkenness not amounting to insanity as quite different from insanity.

In the case of drunkenness, guilty intent is a material ingredient in the offence charged—the jury should have been instructed to determine whether the prisoner in shooting the officer intended to kill him or to do him grievous bodily harm, and that, if the shooting was done with either intent, the prisoner was guilty of murder.

Held, also, that the Judge should have told the jury that the prisoner was entitled to the benefit of any reasonable doubt that remained in their minds upon the whole case, including the reduction of the crime from murder to manslaughter.

Director of Public Prosecutions v. Beard, [1920] A.C. 479, 14 Cr. App. R. 159, and *Regina v. Doherty* (1887), 16 Cox C.C. 306, followed.

There had been a miscarriage of justice, and there should be a new trial.

APPEAL by the prisoner from his conviction upon trial before McEvoy, J., and a jury, upon an indictment for murder.

The principal grounds of appeal were misdirection and non-direction by the trial Judge in his charge to the jury.

The Judge's charge was as follows:—

Gentlemen of the jury, this is a very serious business we are engaged in at this moment. Counsel for the defence, I would like to say here, it seems to me properly, has relieved the court and jury from an over-nice examination of much of the evidence that has been laid before you in this case. Counsel for the defence says the prisoner did shoot and kill McNichol, the officer. That is the starting point. After that he says that upon the whole evidence—the evidence of the Crown as well as the evidence of the defence, when taken all together—he asks you to find that he has made out a defence for this prisoner of such a nature as makes it your duty to find this man guilty of manslaughter, and not find him guilty of murder. In reality, in the way the case sits at the moment—the evidence is closed—that is the only question upon which you are asked to pronounce. You are asked to say that the Crown has failed to establish the crime of murder against this prisoner, notwithstanding that it is admitted that this prisoner, at that window, on the 2nd September, did fire a gun through the window and strike and kill McNichol.

Now, the law is this—and you must take the law from me. What I say is the law to you now is the law so far as you are

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concerned. If I err in my statement of the law, there is a place where I can be corrected, and no doubt shall be corrected; but, if you make any mistake in the facts, there is not much chance of correction. You ought to be careful.

Upon this particular point, which is the main point in the case now, I must say to you that the law is this:—

The presumption that a man intends the natural consequences of his acts may be rebutted in the case of a man who is drunk by shewing that his mind was so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, that it was likely to inflict serious injury. A man is held in law for the natural consequences of his acts; but, if the man at the time the act is committed is drunk, he may escape not the whole but some of the consequences of the act if he can satisfy a jury that his mind was so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, that it was likely to inflict serious injury.

What the defence says in this case is that upon the whole evidence the right result is that this prisoner's mind was so affected by drink that he was incapable of knowing that what he was doing was dangerous, and that it was likely to inflict injury

Now that is the real question that you must determine in order to say whether you are willing to render a verdict of manslaughter only, or whether upon your oaths it is your duty to find a verdict of murder.

Was this prisoner incapable of knowing that what he was doing was dangerous? Do you accept the statement of witnesses for the Crown that this man said as the officer was approaching, "If you hold your life sweet, come no farther?" Did he say that, or words that in your judgment upon the evidence amounted to that? If he did say, "If you hold your life sweet, come no farther," is that the state of mind of a man incapable of knowing that what he was doing was dangerous? Why come no farther if the man did not realise that what he was about to do was dangerous, if he was about to do it?

It seems to me, first, you must determine, are you going to accept that piece of Crown evidence which says that this prisoner, as the officer was approaching the window where it is admitted now he was shot, said to the officer, "If you hold your life sweet, come no farther." That may help you.

The next thing is one thing pointed out by the Crown counsel, that the prisoner got into an altercation with the witness that we have been calling Julia, who was his housekeeper, and fired his gun up the stair; whether at her or what, you are in just as good posi-

tion to conclude upon the evidence as anybody—it is your duty to conclude. But he did fire his gun. He did, if you believe the evidence, then proceed to re-load the barrel of the gun that had been discharged. He did turn out, or you may conclude that he turned out, the light. The light was turned out. And that evidence is not contradicted at all, and it is not pretended that there was anybody else in the cellar to turn out the light except the prisoner; and the light was turned out immediately apparently—it is for you to say upon the evidence—after he had finished reloading the one barrel of the gun; and he then appeared, if you accept the Crown witnesses, at the window.

The evidence as to whether he was sitting down or standing all the time you may not think exactly conclusive, but does it make much difference whether he was sitting down or standing up? Apparently upon all hands, immediately after he re-loaded his gun he went to the window and was there. Why did he go to that window immediately after he had fired the gun up the stairs, and after the housekeeper had left the house, and take his station there? He had been apparently, upon the evidence—it is for you to say—in trouble with the police many times, several times at any rate—a number of times. You know what the result of Julia's rushing out of the house was at any rate. It was that the police were there in a very short time. Did the prisoner know that the rushing out of Julia when he had had this altercation with her, and had fired the gun at her heels, if you like, or some place up the stairs—it is not a common amusement among people to fire guns up the stairs and into the baseboard—counsel for the defence says to you the very fact that he did that, such a foolish, unthinkable thing for a man in anything like his proper control of his senses to do, is so strange that you ought to consider that some evidence in the prisoner's favour, some evidence that he did not know that what he was about to do, when he was firing that gun, was dangerous, and it is fair to weigh it that way.

Then you have got him sitting there, or standing. The officer only barely gets there apparently. He goes up, and it is said that he was waving this light, which would have the appearance of a torch, so counsel for the defence says, and that he did not know what it was. A number of witnesses, if you believe them, have testified that this officer was in uniform, that he had a cap on that designated that he was a policeman. Those who saw him get out and go to the house were able to see that, if you believe the evidence. A number of witnesses were able to see that the man who got out of the car and went to the house was an officer in uniform. Some of those were not in houses. You may think

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that any person in the commencement of darkness in the evening—or if you think the darkness had proceeded a certain distance, which you must arrive at for yourselves—it may occur to you that a person looking out of a window in a house at somebody on the outside approaching the house would have at least as good a chance to see what garb the moving person wore as a person looking out of a house.

But it is not necessary to conclude that Kovach intended to shoot the policeman because he was a policeman, or shoot McNichol because he was McNichol; but he must be taken to be responsible for the natural consequences of his act, and if he knew, he is bound to know that shooting that gun out where somebody was waving a torch—the torch was not waving itself; there was somebody there waving the torch—he must, you may think, be held responsible for shooting where he knew there was some one; if his charge reached that mark it was dangerous and probably fatal.

Now take the other things that this man did. If you believe the evidence, he seems immediately to have come out of the house carrying the gun in his hand. He went over to the place where the object of the catastrophe was. He knew where to go. He arrived at the right place. When he arrived there he picked up the flash light, and was able to use the flash light to descry the features of the dead man, or the shot man—he was not dead yet. He was able to go to the place to get the flash light, and take the flash light and use it to examine the man, according to the witnesses, if you believe that.

Now, did he do that? Did he examine that man's face? Is that the act of a man who was drunk, to such an extent that he does not know that it is dangerous to fire a gun out of the window at a place where he, you may think, must have known there was a human being?

When the young man of his own country came and seized the gun and carried it away from him, you heard what was sworn, that he said, "Is that your gun?" or, "That is my gun." Is that the action of a man who was so drunk at that moment that he did not know enough to appreciate that it was dangerous to fire a gun out of a window in a place where a man was standing, or if he only knew there was somebody there waving the torch, as was said? Does that look to you like the conduct of a man who was so drunk that he did not appreciate that it was dangerous to do the very thing he did—admittedly did?

Then he is taken to the police station. I am not of opinion under the present condition of affairs that what occurred at the

police station is of very great importance, except that three experienced officers swear that this man was normal; he was not drunk; he had been drinking perhaps. They went as far as Mr. Flett went, the lawyer. He saw him at 4 or 5 in the afternoon. He did not say he was drunk, but had had a few drinks, I think he said. It is not a defence to the crime of murder, or it is not a defence to reduce it to manslaughter, to say, "I was drunk." It is said by very wise judges, very experienced judges, that nobody has yet been able to define just what is being drunk. But, fortunately for you, you do not have to wrestle with that broad term, being drunk or not being drunk. What you must determine is if this man can shew that his mind was so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous and was likely to inflict serious injury. That is your test. If upon the whole evidence you feel honestly that this man was drunk to the extent that he did not know what he was doing was dangerous and likely to cause serious injury, then the offence ought to be reduced to manslaughter, but that is all for you.

If you can say upon this evidence that a man who did what the Crown witnesses say he did, and did it in the way in which they say he did, was so drunk that he did not know it was dangerous to fire a gun out where there was somebody standing in front of the window, then that is your responsibility.

You are standing between this man and the country. The country is entitled to be protected against murder, and this man is entitled to the full benefit of the defence the law gives him. But the burden is on your shoulders, squarely on you. You must be satisfied that this man was so drunk that he did not know enough to realise that it was dangerous to fire that gun out of the window that night at that very moment.

Now the professional evidence upon that question— you have heard it. A medical doctor, with rather imposing degrees, with, as he told you, a considerable experience, saw this man an hour or so after the shooting. He spent ten minutes with him; he took his pulse; he scraped him on the abdomen with his nail to see what reaction he would get as to the colour and marking of his skin, and as to whether he would flinch unnaturally, too much; and he tried his knee reflexes. You know what that means. He puts one leg over the other, and just at the bottom of the knee-cap he gives it a sharp blow with the side of his hand. The toe flips up in a normal patient a certain distance, and in a person whose condition is not normal it flips up a different distance. He says he did those things, and he talked to the man. You may wonder

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just what they talked about. A man who an hour before had so little comprehension of what he was about as to shoot out of a window, where he knew, or may have known, or you may think he knew, a man was, and who was probably, I gather—it is for you to say from the evidence—I thought from what the doctor said he believed the man was likely worse dazed when he saw him than he would be an hour before. Well, what information do you think you would get from a man who was so unable to control himself, unable to know what he was doing or saying, as the doctor intimates that he was; and if he did get any statement from him, what use do you suppose it would be to you or to him?

Now, the doctor has pledged his professional oath upon the examination he gave the man, plus his knowledge of the man before, which was apparently considerable, and plus a later examination at which he went further and concluded that the man was entirely irresponsible that night. That was before he heard the evidence in this case. That is the conclusion he came to two days before. We have not any evidence that when he came to that conclusion he had the evidence of all the things this prisoner did that night. If he did get any evidence of it, I suppose he got it from the man himself. Now, it is for you to say. You perhaps know Dr. Binns. It is for you to weigh the evidence. You are not obliged to accept the evidence of any witness, and you may accept any part of the evidence of any witness, and reject any other part that does not recommend itself to your judgment, and to your knowledge and skill in the ways of men and affairs, when you put it up against all the other evidence.

You have the evidence of the two gentlemen, one from the Hamilton Asylum, and the other from the Whitby Asylum. These two men say to you: "In our opinion it is quite impossible for any doctor, or very doubtful whether any doctor, with the kind of examination that Dr. Binns himself said he made, to form any reliable opinion upon the matter." These two men swear that they would not give any opinion about the case upon such an examination. That is all right. Perhaps they would not. Perhaps they are more careful; perhaps they have not had as much experience. There are many reasons, but all that is for you. You heard what they said. They said upon that examination he made they would not do it; they are doubtful whether anybody could.

But does that evidence really weigh very much with you? I thought counsel for the defence said a very strong, sane thing when he said in this case, with all the facts that have been developed, you may know just as well as any doctor whether this man was so drunk that he did not know what he was doing.

After all, if you accept the doctor's evidence, of course he swears that the man in his opinion didn't know what he was doing. Well, that is his opinion. But you are entitled to your opinion, and if when you analyse all the facts, and all the things the man did and said, and how he conducted himself, you may not be able to accept the doctor's opinion, especially in the light of what the two other doctors say—but that is all in your province; you have a right to accept the doctor if you think that honestly it is the true and honest fact of the matter. You are not entitled to accept his evidence and neglect to weigh all the other evidence, but if upon the whole you come to the conclusion that what the doctor says about it as being his opinion, with the other evidence, convinces you that that is the real fact, that this man was, the moment that shot was fired, so drunk that he was incapable of knowing that what he was doing was dangerous, that it was likely to inflict serious injury, then you ought to reduce this verdict to manslaughter. But I say to you, gentlemen, it is a serious duty.

If he has not satisfied you upon the whole case that he did not comprehend that what he was doing was dangerous, then you must do your duty. It is hard—it is hard for you and hard for me, but that is no reason for shirking. You are sworn to do your duty upon the evidence as you see it. Do your best, be honest, be unafraid, and do your duty as conscience dictates, and come to an honest and right conclusion.

Upon any matter I have charged I will hear counsel after the jury retire. Upon any matter I have not charged, and which counsel think I ought to charge upon, I will hear counsel now.

Mr. German: I will just ask your Lordship to tell the jury if they have a reasonable doubt the prisoner of course is entitled to the doubt in his favour.

His Lordship: You do not mean if they have any reasonable doubt as to whether he has made out a defence or not. That is not a question of reasonable doubt. The defence must be made out to their satisfaction. I have put it that way to them. I cannot put it the other way, Mr. German; I do not think the law allows me to. But upon the other issue, don't you see, the question of reasonable doubt has been admitted. The whole question now is, are they satisfied that the man was in the state of mind which the law requires?

Mr. German: Yes, that is right.

His Lordship (to the jury): There is another thing I want to say to you, gentlemen of the jury, about that cask of liquor or demijohn put in as an exhibit—the woman says she put that liquor in the bottle. There is a label on the bottle. That

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label ought not to mean anything to you, because the evidence is that she filled the bottle herself. What she filled it with, or the strength of liquor she put in it, you have not much to guide you. I think there is a trifle of liquor there, and I warn you that that trifle should not be considered by you as being the very dregs of the liquor that was in that bottle. I do not know whether it is strong or weak. The evidence about the wine that was consumed was the evidence of the woman, and she said it was strong cherry wine. I do not think we have any other evidence as to the strength of the liquor that was consumed in the cellar, as far as I remember. Is there any?

Mr. German: No.

November 28. The appeal was heard by MULLOCK, C.J.O., MAGEE, MIDDLETON, FISHER, and GRANT, JJ.A.

Allan Brooks, for the appellant, contended that members of the jury, during the adjournment, were permitted to communicate with various persons, contrary to sec. 945 of the Criminal Code. Several jurymen used the telephone at the hotel where they were lodged. They were allowed to separate for the purpose of communicating with their homes, and while doing so they were not under the control of the Court, no police officer being in attendance. Reference to *Rex v. Ketteridge* (1914), 11 Cr. App. R. 54; *Rex v. Walters* (1926), 45 Can. Crim. Cas. 77. The trial Judge erred in not directing the jury as to the onus of proof, and upon the question of "reasonable doubt" in reducing the crime from murder to manslaughter: *Rex v. Primak* (1930), 53 Can. Crim. Cas. 203. He did not explain to the jury, as he ought to have done, that the onus was upon the Crown to prove the necessary ingredients of the murder charge, one of which was "intent:" *Director of Public Prosecutions v. Beard*, [1920] A.C. 479; *Rex v. Payette* (1925), 44 Can. Crim. Cas. 209. The trial Judge ought to have directed the jury to find the accused guilty of manslaughter, and not murder, if they were of the opinion that the accused was so drunk at the time of the shooting that he was incapable of forming an intent: *Rex v. Studdard* (1915), 25 Can. Crim. Cas. 81; *Rex v. Stoddart* (1909), 2 Cr. App. R. 217.

Edward Bayly, K.C., for the Crown. Where the doing of the act with which an accused person is charged is admitted, the question of reasonable doubt does not arise. Reference to Archbold's Criminal Pleading Evidence and Practice, 27th ed., p. 20. At the trial the counsel for the appellant admitted the shooting of McNichol by the appellant.

December 5. The judgment of the Court was read by MULOCK, C.J.O.:—This is an appeal from the conviction of the accused for murder. The circumstances of the case are as follows:—

At about 6 o'clock in the evening of the 2nd September, 1930, the accused was in the cellar of his house in the city of Welland, where he resided with a woman called Julia Vida, and she, on going into the cellar, saw the accused drinking what she described as strong cherry wine from a gallon-jug, and engaged in cleaning a double-barrelled shot-gun. She swore that he was angry and using profane language. Leaving him in the cellar, she ascended to the kitchen, the jug, which had been full in the afternoon, being then about half empty. At about 7.30 p.m. she again descended to the cellar and observed that there was then about "three fingers" of cherry wine in the jug. The accused was then sitting on a bench cursing and mad; whereupon she took the jug upstairs to the kitchen. Almost at once she heard a shot fired in the cellar and ran out to the street and called the police. Some one telephoned to the police station, and in response to the call constables Spencer and McNichol drove to the vicinity of the house of the accused. McNichol, who was in uniform, left the car and proceeded to the house. On his arrival there a shot was fired through the window of the house and McNichol was hit in the head by numerous grains of shot; he fell to the ground, was removed to the hospital, and died almost immediately on arrival there. The shooting took place at about 8.30 p.m.

The evidence fully warrants a finding that the accused fired the fatal shot—in fact this was practically admitted by his counsel. The only defence was that the accused was so drunk as to be incapable of forming an intent, and therefore at most was guilty only of manslaughter.

In disposing of the appeal, it is sufficient to consider two grounds of appeal, the first being misdirection of the jury by the learned trial Judge.

In his charge to the jury, the learned Judge instructed them as follows:—

"What you must determine is if this man can shew that his mind was so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous and so likely to inflict serious injury. That is your test. If upon the whole evidence you feel honestly that this man was drunk to the extent that he did not know what he was doing was dangerous and likely to cause serious injury, then the offence ought to be reduced to manslaughter, but that is for you."

With respect, I am of opinion that the learned trial Judge

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erred in his instructions to the jury as to the test to be applied in determining the guilt or innocence of the accused, where, as here, insanity was neither pleaded nor attempted to be proved. He seems to have regarded the defence as that of insanity, and has applied to it, though only partially, the statutory defence provided by sec. 19 of the Criminal Code to a case where the defence is insanity.

In *Director of Public Prosecutions v. Beard*, [1920] A.C. 479, 505, it was held "that the test of criminal responsibility is not the same in the case of drunkenness as in the case of insanity, and, upon a plea of drunkenness where insanity is not pleaded, the jury should not be asked to consider whether, if the accused knew what he was doing, he knew also that he was doing wrong," and that the trial Judge was mistaken in applying the test of insanity to a case of drunkenness not amounting to insanity."

The law regards drunkenness not amounting to insanity as quite different from insanity, which is a visitation of Providence, and the test applied to the state of mind of an insane person is not applicable to that of a drunken person.

In the case of drunkenness, guilty intent is a material ingredient in the offence charged, and here the jury should have been instructed to determine whether the accused in shooting McNichol intended to kill him or to do him grievous bodily harm, and that, if the shooting was done with either intent, the accused was guilty of murder: *Regina v. Doherty* (1887), 16 Cox C.C. 306.

The minds of the jury were never directed to the question of intent, nor did they pronounce upon it. There cannot be a conviction of murder unless the jury has found that the accused in causing death was moved by guilty intent.

In another respect the charge is defective. The learned Judge should have told the jury, as Mr. Justice Bailhache did in the *Beard* case, that the prisoner was entitled to the benefit of any reasonable doubt that remained in their minds upon the whole case, including the reduction of the charge from murder to manslaughter. This charge, which is found in 14 Cr. App. R. 159, at p. 162, was not adversely criticised in this respect in any of the Courts. It is there said:—

"There is no suggestion here that there can be a verdict of not guilty. . . . The alternative verdicts are murder or manslaughter. It is for you to say which of these two crimes this man has committed—whether he is guilty of the full crime of murder, or whether he has satisfied you that he was so drunk as to reduce the crime to manslaughter. If you have any doubt about it you will give the prisoner the benefit of the doubt and return a verdict

for the lesser offence; but if you have no doubt about it, then it is your plain duty to return a verdict for the greater offence.”

For these reasons I am of opinion that there has been a miscarriage of justice, and that the conviction of murder should be set aside and a new trial had.

Order directing a new trial.

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[APPELLATE DIVISION.]

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*Negligence—Injury to Boy by Live Wire Left Lying on Sidewalk—
Evidence—Findings of Jury—Inference—Res Ipsa Loquitur—Onus.*

July 10.

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The infant plaintiff was injured by coming into contact with a live wire belonging to the defendant company, which had broken and fallen to the sidewalk in a city street. At the trial of an action to recover damages for the injury and loss sustained, the jury found that the injury was caused by the negligence of the defendant company, and “We consider the wire was defective, wires running close to trees should have a more thorough inspection.” They also found that there was no negligence of the infant plaintiff which caused or contributed to his injury. The accident was apparently caused by a storm driving one wire against another in the branches of a tree, and thus creating a “short circuit.” There was evidence of proper construction and good condition of the defendant company’s transmission-line, of which the wire touched by the infant plaintiff had formed part:—

Held (RIDDELL, J.A., dissenting), that the plaintiffs were entitled to rely upon the maxim *res ipsa loquitur*; that the defendant company had failed to satisfy the onus cast upon it; and that the jury were justified in drawing the inference that the contact of the limbs of the trees with the wire caused it to break.

Review of the authorities.

Wing v. London General Omnibus Co., [1909] 2 K.B. 652, *Vandry v. Quebec Railway Light Heat and Power Co.* (1916), 53 Can. S.C.R. 72, *Quebec Railway Light Heat and Power Co. v. Vandry*. [1920] A.C. 662, and *Manchester Corporation v. Farnworth*, [1930] A.C. 171, specially referred to.

Per RIDDELL, J.A.:—Assuming, without deciding, that the plaintiffs might rely upon the maxim *res ipsa loquitur*, the defendant company had met the onus cast upon it.

An action brought on behalf of Leo Crepin, an infant, by his father as next friend, and by the father on his own behalf, to recover damages for injury to the infant, caused, as alleged, by the negligence of the defendant company.

The action was tried before KELLY, J., and a jury, at Ottawa. J. A. Burrows, for the plaintiffs.

G. F. Henderson, K.C., and D. Watt, for the defendant company.

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July 10. KELLY, J.:—The Act of incorporation of the defendant company, 57 & 58 Vict. (Dom.) ch. 111, empowers it to construct, erect, maintain and operate wires along the sides of and across and under public highways, streets, etc., and supply electric current thereby, subject to the terms and provisions therein set out. The defendant company did construct, and it maintains, such wires on certain streets in the city of Ottawa.

On the 4th August, 1928, the plaintiff Leo Crepin, an infant under 21 years of age, was injured by coming into contact with a live wire belonging to the defendant company which had broken and fallen to the sidewalk on Carling-avenue in Ottawa. The action is by the infant, by his father, Augustin Crepin, as his next friend, and the said Augustin Crepin, for damages in consequence.

In the statement of claim it is alleged that the boy's injury was caused by the defendant company's negligence, but no particular or specific acts of negligence are there charged. Some time prior to the trial, an application to a Judge in Chambers for particulars of the negligence was referred to the trial Judge. At the opening of the trial the defendant's counsel renewed the application; and, on being asked to state what were the specific acts of negligence upon which evidence would be adduced, the plaintiffs' counsel stated as follows:—

“That a live wire belonging to the defendant company had fallen on the highway about 6.20 p.m. That the defendant company was notified immediately that a live wire was lying exposed on the highway. That the infant plaintiff was proceeding along Carling-avenue, about 7 o'clock the same evening, and fell on this live wire and sustained these injuries. One act of negligence we complain of is the unreasonable length of time this wire was allowed to remain on the highway and the unjustifiable delay in failing to despatch a repair-car or some one to guard the live wire so as to obviate the possibility of accident or injury to travellers on the highway. Then I submit that it is an act of negligence on the part of the defendant company to allow a live wire to lie exposed on the highway.”

There was evidence, indeed it seems to be conceded, that a live wire of the defendant company did fall and injure the infant plaintiff. Much of the trial evidence was directed to the allegation that for an unreasonable length of time the wire was allowed to remain on the highway, and that there was delay in repairing or guarding it after it had fallen. There was evidence also as to the character of a rain-storm a short time prior to the accident, which, it was suggested, had something to do with the falling of the wire. The storm was described by witnesses called for the

plaintiffs as "very heavy wind" and "very heavy rain;" still another said that he would not class it as a heavy storm but as a local thunder-storm. There was also evidence of more than one of these witnesses of having heard an explosion about the time of the storm, or it might be at the time that the wire fell, and also of a live wire having been seen looped over a branch of a tree and hanging towards the sidewalk. In the evidence for the defence it was stated that there was observed a "burn" on the limb of a tree at that place, shewing contact, which explained the explosion.

In answering the questions submitted, the only negligence found by the jury was: "We consider the wire was defective, wires running close to trees should have a more thorough inspection."

It was contended on the argument that the finding that the wire was defective was not supported by evidence. Witnesses on behalf of the defence told of the manner and the extent of the inspection of the wires and said that they were in satisfactory condition; but none of them stated that they had observed their condition at or for some time prior to the accident.

The jury were entitled to draw any reasonable inference as to the condition of the wires from such evidence as that there was an explosion due to contact of the wire with the limb of the tree, and that there was a "burn" on the limb at the place of contact, etc.; and it might have been pertinent for them to have considered whether the presence of the "burn" indicated want of insulation or defective insulation of the wire, and whether, if there had been more careful or more frequent inspection, the defect, if it existed, might have been observed.

Our Courts have declared that persons dealing in electricity must exercise the high degree of skill, care, and foresight required of persons engaged in operations of a dangerous nature; and that any one dealing in electricity is bound to the public to exercise the utmost degree of care in the construction, inspection, repair, and operation of the apparatus and appliances: *Royal Electric Co. v. Hévé* (1902), 32 Can. S.C.R. 462; *Young v. Town of Gravenhurst* (1910-11), 22 O.L.R. 291, 24 O.L.R. 467. The duty of exercising care in the operation of electric plants and wiring such as the defendant's—admittedly highly dangerous—is accentuated by the fact that those so operating possess greater knowledge of such matters and that they have the power and opportunity of observing and testing the lines and equipment not possessed by the users of streets or highways over which the wires are carried. Can it be said, therefore, that a case has been presented by the evidence from which the jury might draw an inference which would lead to the conclusion that the breaking or falling (or both) of the live wire

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was due to a defect therein and that there was negligence or want of proper care and attention on the part of the defendant? The jury are justified in considering the balance of probabilities and drawing an inference from the proven circumstances: *Grand Trunk Railway Co. v. Griffith* (1911), 45 Can. S.C.R. 380.

My opinion is that, in the circumstances, there was evidence from which the jury could reasonably have inferred that the wire was defective, and that, therefore, and even without reference to the principle of *res ipsa loquitur*, upon which also the plaintiffs' counsel relied, and which it is unnecessary to discuss here, the defendant company should be considered liable for the negligence which caused the injury.

The defendant company appealed from the judgment of KELLY, J.

October 21. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

Henderson, K.C., for the appellant company, argued that no negligence on its part was proved. The company's line was built of the best material obtainable and was in first-class condition. There was no evidence that more frequent inspection would have prevented the accident. Even if the plaintiffs could rely on the doctrine of *res ipsa loquitur*, the appellant company had met the onus which that doctrine would place upon it. The falling of the wire was a pure accident, and was the natural result of the exercise of the appellant company's statutory powers during an extraordinary storm. Reference to *Curry v. Sandwich Windsor and Amherstburg Railway Co.* (1914), 7 O.W.N. 140; *Canivet v. Brown's Bread Ltd.* (1929), 64 O.L.R. 580.

Burrows, for the plaintiffs, respondents, contended that they had the right to rely on the principle *res ipsa loquitur*; it had not been abandoned at the trial, and the appellant company had not met the onus placed on it. It was negligent in running electrically charged wires through trees, where swaying branches during a storm brought one charged wire in contact with another; and a more careful inspection would have prevented the accident. The appellant company failed to exercise that high degree of skill, care, and foresight which is required of persons or corporations using electric wires upon highways. Reference to *Toronto Railway Co. v. Fleming* (1913), 47 Can. S.C.R. 612; *Young v. Town of Gravenhurst*, 22 O.L.R. 291, 24 O.L.R. 467; *Eastern and South African Telegraph Co. Ltd. v. Cape Town Tramways Companies Ltd.*, [1902] A.C. 381; *Vandry v. Quebec Railway Light Heat and*

Power Co. (1916), 53 Can. S.C.R. 72; *Royal Electric Co. v. Hévé*, 32 Can. S.C.R. 462; *Haynes v. Raleigh Gas Co.* (1894), 114 N. Car. 203; *Leavenworth Coal Co. v. Ratchford* (1897), 5 Kans. App. 150; *City Electric Street Railway Co. v. Conery* (1895), 61 Ark. 381.

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December 5. LATCHFORD, C.J.:—This appeal is from the judgment of Kelly, J., of the 10th July, 1930, entered upon the verdict of a jury in favour of Leo Crepin, an infant about 10 years of age, for \$10,000, and in favour of his father and next friend, Augustin Crepin, for \$100, after trial at Ottawa on the 18th and 19th March, 1930.

The action was to recover damages for injuries caused to the infant plaintiff and expenses, etc., occasioned to his father by the negligence of the defendant company. The injuries were sustained early in the evening of the 4th August, 1928, when the hand of the lad, who was walking or running west upon Carling-avenue, in the city of Ottawa, came into contact with a "live" wire of the defendant company, broken about half an hour or an hour previously, which was lying on the sidewalk. He said that he had not seen the wire, that going along he happened to slip and "fell right on the wire," which his hand touched. As a result four of his fingers and part of one of his hands were necessarily amputated.

The defendant company denied negligence and pleaded its Act of incorporation, 57 & 58 Vict. ch. 111. It further alleged that on the day mentioned one of its wires was broken by a severe electrical storm, accompanied by a heavy wind, and that, if the infant plaintiff suffered any injury by coming into contact with a live wire belonging to the defendant company, the wire was that which was broken during the storm.

The jury found that the defendant company was negligent. Its negligence was thus stated: "We consider the wire was defective, wires running close to trees should have a more thorough inspection."

The first and second grounds of appeal may be stated in brief as follows:—

"That at the opening of the trial, the specific and only act of negligence which counsel for the plaintiffs stated he relied on was an unjustifiable delay on the part of the defendant in failing to repair or guard the broken wire and that the jury made no finding on such question."

The third ground I quote in full:—

"That the learned trial Judge erred in holding that a jury could find a verdict of negligence on common knowledge of the

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dangerous nature of an electric light system, and should have held that, in any event, any presumption was rebutted by direct evidence that the defendant's line was of the most modern construction, had been properly inspected, and was in fact in good repair, and that the breaking of the wire in question was due to a violent storm over which the defendant had no control."

No question arises as to the quantum of the damages awarded.

When the trial was begun, Mr. Henderson pressed for particulars of the negligence alleged. Particulars had previously been demanded in the usual way, and the demand had been referred to the trial Judge.

After some discussion, his Lordship, addressing the plaintiffs' counsel, Mr. Burrows, said:—

"It may be difficult to put the case before the jury unless we know what you say the negligence is that you allege.

"Mr. Burrows: The first ground is in leaving a live wire lying on the highway.

"His Lordship: State all the acts of negligence upon which you are going to adduce evidence, because I do not want the jury wandering around finding negligence if it is not pleaded.

"Mr. Burrows: Suppose I prove by the evidence I intend to adduce that this wire was on the highway, is your Lordship going to make a ruling now as to whether the maxim *res ipsa loquitur* applies or not?

"His Lordship: No; I am giving you an opportunity to state what you allege were the acts of negligence on the part of the defendant on which evidence is now to be given.

"Mr. Burrows: If the maxim applies I am not bound to produce any specific acts.

"His Lordship: I am not going to shut you out from applying the maxim; but, now that you have pleaded negligence, if you have in mind the acts of negligence you are relying upon, I think we should know what they are.

"Mr. Burrows: And I will not be debarred from applying the maxim?

"Mr. Henderson: I submit that negligence having been pleaded, the maxim cannot apply.

"His Lordship: That is a matter of law.

"Mr. Burrows: My evidence will be as follows: that a live wire belonging to the defendant company had fallen on the highway about 6.20 p.m.; that the defendant company was notified immediately that a live wire was lying exposed on the highway; that the infant plaintiff was proceeding along Carling-avenue, about 7 o'clock the same evening, and fell on this live wire and

sustained these injuries. One act of negligence we complain of is the unreasonable length of time this wire was allowed to remain on the highway, and the defendant company's unjustifiable delay in failing to despatch a repair-car or some one to guard the live wire so as to obviate the possibility of accident or injury to travellers on the highway. Then I submit that it is an act of negligence on the part of the defendant company to allow a live wire to lie exposed on the highway.

"Mr. Henderson: That is quite satisfactory. I now understand my learned friend's position."

What Mr. Burrows apparently had in mind was not only the delay which ensued after the defendant's repair-men knew or ought to have known of the collapse of the wire, but also that, proving that the injuries resulted from a dangerous thing in the absolute control of the defendant, an onus was cast upon the defendant of proving that the accident was not the result of any negligence on its part. Mr. Burrows never abandoned this latter contention.

As the finding of the jury impliedly negatives the negligence attributed to delay in repairing the broken wire, the evidence submitted on that aspect of the case may be wholly disregarded.

A witness named Allison Payton was standing on the sidewalk, under a large tree in Carling-avenue during the rain and thunder-storm, "when there was a tremendous explosion, and with that fire travelled along the wires, and down the wires came and surrounded me on the sidewalk." There was, she said on cross-examination, "not such an awful wind then, there was later. . . . The wire fell right on my feet. . . . I was simply stunned for the moment." Everything around was wet and the wire was sparking and squirming. Mrs. Payton was able to reach her home near-by, and knew nothing relating to the happening of the accident.

Arthur Peskett, while in his house a short distance away, heard an explosion between 6 and 6.30, and going out found that a wire had fallen from the west side of a pole and was hanging straight down into the centre of the sidewalk. He thought the wire belonged to the defendant company and called one of its offices from a neighbouring house. He was answered, and he advised the person answering that the wire had fallen and was dangerous. Mr. Henderson suggests that this information was given to the Hydro-Electric System, but there is no evidence supporting the suggestion beyond the fact that a Hydro repair-gang who were in the vicinity, where the Hydro had also a line, reached the scene of the accident and cut the hanging wires before the defendant's men arrived.

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Later, which Peskett fixes as about 7.10, he heard a scream, and going across the avenue found the boy Crepin injured and unconscious, about 3 feet from the wire, which was swinging from the limb of a tree, the tree no doubt under which Mrs. Payton had sought a precarious refuge.

It was admitted that the electric line where the break occurred was owned and maintained by the defendant.

The remaining evidence on behalf of the plaintiffs relates to the occurrence of the accident and the resultant injury and damages, as to which there is no dispute.

At the close of the plaintiffs' case, Mr. Henderson submitted that the action should be dismissed. There was, he contended, no evidence of unreasonable delay in effecting repairs, and the maxim *res ipsa loquitur* did not apply. His Lordship decided to hear the evidence subject to the motion for a nonsuit.

The evidence for the defence then put in may be summed up in a few words. The pole and wire line was comparatively new, constructed of the best possible materials and constantly inspected, so that it was, *as a line*, in a state of the highest efficiency at the time of the accident.

Leo Clements, a foreman of the defendant, and his men had assembled at a central point in Ottawa, as was the custom when, as on the evening of the accident, there was "a severe wind-storm and rain and a little thunder." He and his men were there subject to call in the emergencies that might arise. He answered a call to Carling-avenue, and on arriving there met the Hydro men who, having seen the live wire, "cleared it from danger." He was asked on examination-in-chief:—

"Was there anything wrong with the line to cause a break there that night? A. No, not so far as the line is concerned."

The qualification is important, as will be noticed from the answer to the next question:—

"Could you see from the condition there what had caused it (the wire) to fall? A. Yes; there was a limb which indicated a burn on it, and that limb had caused the two wires to come together, and caused them to short-circuit, and caused them to come down."

He said later that, "if the wire had broken owing to its defective condition, there would be only one fall and not the occasion of the two (wires) going at the same time. *It chanced that a branch put these two wires together and caused them to burn and drop down.*"

When the jury found that the negligence which they attributed to the defendant was that "the wire was defective, wires run-

ning close to trees should have a more thorough inspection," they did not, in my opinion, mean, considering both phases of their answer, that in material there was a defect in the wire as a conductor of electrical energy or "as a line," or part of a line. The wire, being of proper size and strength upon the evidence on behalf of the defendant, could not properly be held to have been materially defective. When the two phases of the jury's finding as to the cause of the accident are considered, their meaning, I am satisfied, is this: the location of the wire through the tree where, during rain and a high wind—a frequent combination of circumstances—the swaying of a wet branch brought one charged wire into contact with another, causing the break and the accident, was negligence, which the defendant could have avoided by a more careful inspection. That is the meaning which is intended to be expressed and is clearly implied in the answer of the jury in regard to the negligence causing the accident.

That answer is, in my opinion, sufficient to sustain the judgment appealed against. A dangerous thing belonging to the defendant and in its sole control had caused the injuries sustained by the infant plaintiff, without negligence on his part, as the jury found. *Res ipsa loquitur*—in the sense in which that maxim has been authoritatively applied—and it was for the defendant to establish that, in the circumstances, it was not negligent, and it had failed to do so.

The principle applicable is based on such cases as *Byrne v. Boadle* (1863), 2 H. & C. 722, and *Scott v. London and St. Katherine Docks Co.* (1865), 3 H. & C. 596, and is thus stated by Salmond on Torts, 7th ed., p. 33:—

"The rule that it is for the plaintiff to prove negligence, and not for the defendant to disprove it, is in some cases one of considerable hardship to the plaintiff; because it may be that the true cause of the accident lies solely within the knowledge of the defendant who caused it. The plaintiff can prove the accident, but he cannot prove how it happened so as to shew its origin in the negligence of the defendant. This hardship is avoided to a considerable extent by the rule of *res ipsa loquitur*. There are many cases in which the accident speaks for itself, so that it is sufficient for the plaintiff to prove the accident and nothing more. He is then entitled to have the case submitted to the jury, and it is for the defendant, if he can, to persuade the jury that the accident arose through no negligence of his.

Beven, 4th ed., vol. 1, p. 126, states the law to be:—

"The mere occurrence of an injury is sufficient to raise a *prima facie* case:

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“(a) When the injurious agency is under the management of the defendants;

(b) When the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care.”

In *Wing v. London General Omnibus Co.*, [1909] 2 K.B. 652, at p. 663, Fletcher Moulton, L.J., said:—

“Without attempting to lay down any exhaustive classification of the cases in which the principle of *res ipsa loquitur* applies, it may generally be said that the principle only applies when the direct cause of the accident, and so much of the surrounding circumstances as was essential to its occurrence, were within the sole control and management of the defendants, or their servants, so that it is not unfair to attribute to them a *primâ facie* responsibility for what happened.”

There are several decisions in our own courts in actions of negligence causing injuries owing to electric wires. Most of these are not directly in point, as they turn more particularly on arts. 1053 and 1054 of the Civil Code of Quebec. These articles probably impose greater liability on a defendant than does the law of England and Ontario. In *Quebec Railway Light Heat and Power Co. v. Vandry*, [1920] A.C. 662, Lord Sumner, at pp. 676, 677, states the effect of these articles to be as follows:—

“Proof that damage has been caused by things under the defendant’s care does not raise a mere presumption of *faute*, which the defendant may rebut by proving affirmatively that he was guilty of no *faute*. It establishes a liability, unless, in cases where the exculpatory paragraph applies, the defendant brings himself within its terms.”

However, the reports of the Quebec cases contain many observations which are pertinent to this appeal. I cite a few.

In *Royal Electric Co. v. Hévê*, 32 Can. S.C.R. 462, there was no inference to be drawn from the established facts as to how the deceased came to his death. On appeal from the judgment of the Court of King’s Bench, affirming the judgment maintaining the plaintiff’s action, it was held that the defendants were liable, as they had failed to exercise the high degree of skill, care, and foresight required of persons engaging in operations of a dangerous nature.

The Supreme Court of Canada unanimously affirmed the judgment of the King’s Bench. Davies, J. (p. 470), expressed his full concurrence in the statement of Mr. Justice Hall in the Court below, that defendants, while disposing of a commodity of so recognised a dangerous character as electricity, are “bound to a

supervision and a diligence proportionate to the peculiar character and danger of the commodity in which they deal." The learned Justice of the Supreme Court continues: "They (the defendants) are bound to carry on the business with all possible skill, care, and foresight, and are bound in doing so to anticipate and take into consideration *such conditions of weather as may be reasonably expected in our climate*. The law in requiring from them the highest care and skill and the exercise of constant vigilance in their business and operations does nothing more than, having regard to the extremely dangerous character of the article or substance they supply, is necessary for the proper protection of those with whom they deal."

I would add that a like obligation is owing to a person like the boy Crepin lawfully using a public highway along which a company like the defendant has been empowered by statute to transmit a force liable to become uncontrolled if its conductors are allowed to pass through trees without adequate protection in weather conditions that frequently prevail.

In the *Vandry* case in the Supreme Court of Canada, 53 Can. S.C.R. 72, the damages sought to be recovered resulted from the fall of a sleet-encased branch of a poplar tree across a transmission-line of the defendant. The tree was growing some distance from a wire on private property, and the branch, either swaying or breaking, brought a high tension wire of the defendant in contact with a low tension wire connected with Vandry's premises, causing a fire.

In his judgment Mr. Justice Anglin (now Chief Justice of Canada) said (p. 118):—

"That the storm, with its accompaniments of sleet and heavy ice formations on trees and wires and high wind, was not in itself so extraordinary that it should be regarded as unforeseeable, or as constituting *force majeure*, so that its ordinary or not improbable consequences would be something which persons in the position of the defendants would not be bound to anticipate and guard against, is, I think, quite clear."

In the present case the defendant did not satisfy the onus cast upon it by the very nature of the accident. The rain and wind which prevailed when the boy was injured were such as occur every summer in Canada, and often every summer. So frequent are such occurrences here that an electric power transmission-line like that of the defendant in this case should be reasonably expected to guard against the consequences of the location of a high voltage line maintained through a large tree whose swaying branches in a storm could, and in this case did, bring two highly

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charged wires into contact, with a break in one at least of them as the ordinary result. That interference with the line was anticipated is established by the fact that, whenever a storm arose, the repair-gang of the defendant gathered at a central point whence they could be called in the emergencies that were likely to arise. It is obvious, I think, that proper inspection of the line, as it passed through the tree causing the short circuit, would have obviated the contacts which broke the wire. That such an inspection was not had is the true effect of the jury's finding, and the defendant should bear the consequences.

I would affirm the judgment and dismiss the appeal with costs.

MASTEN, J.A.:—The defendant corporation was incorporated by a special Act, 57 & 58 Vict. (Dom.) ch. 111, for the purpose of producing and disposing of electricity and electrical current for heat, light, and power in the city of Ottawa. By the 8th section of that Act it was empowered to take over the business, franchise, and undertaking of a number of local companies then operating in the city of Ottawa, and it has since continued in the business so taken over. So far as I have observed, it does not appear whether a franchise was granted to the company by the Corporation of the City of Ottawa, but I assume that that was the case.

By the 9th section the company was empowered to construct, maintain, and operate its wires along the sides of, across, and under all public highways.

By para. (a) of sec. 9, it was provided that the company should not interfere with the public right of travelling on or using public roads, highways, etc., along which its lines were strung.

Acting under this statute, the defendant company strung its line of wires on and along Carling-avenue, in the city of Ottawa.

On or about the 4th August, 1928, a storm occurred, the defendant's line broke, and a live wire fell to the sidewalk on that highway. The infant plaintiff was lawfully passing along the highway; he tripped and fell at the place where the live wire was lying on the sidewalk and was seriously injured. This action is brought in consequence.

I agree with the other members of the Court that the claim of the plaintiffs to avail themselves of the doctrine of *res ipsa loquitur* was never abandoned by counsel for the plaintiffs, and that he is entitled to urge his present appeal upon that footing. It is doubtful, in my opinion, whether he is driven to do so. When the plaintiffs proved that the defendant's live wire was on the highway and that the boy plaintiff was injured by coming in contact with it, he had established a *primâ facie* case of a nuisance

from which he had suffered special damage. Thereupon the onus shifted, and it devolved upon the defendant to make out a defence establishing that the alleged nuisance did not arise from any fault or neglect chargeable to it.

Being empowered and authorised by statute to string its electrical wires along Carling-avenue, the case is taken out of the doctrine of *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330. The defendant does not become an insurer. The obligation that devolves upon it is fully discussed, and the law is restated and applied, by the House of Lords in the very recent case of *Manchester Corporation v. Farnworth*, [1930] A.C. 171.

In that case the plaintiff was a farmer, and sued the Municipal Corporation of Manchester for an injunction and damages on the ground of nuisance by the emission of poisonous fumes from the chimneys of an electrical generating station erected by the defendants in the neighbourhood of his farm. The defendants pleaded that the acts complained of were done in pursuance of the powers conferred on them by the Manchester Corporation Act, 1914. At p. 183, Viscount Dunedin states the law applicable to such a situation:—

“When Parliament has authorised a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorised. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense.”

To the like effect is the more elaborate statement of Lord Sumner at pp. 201 and 203.

In the action here under consideration the defendant seeks to establish that the falling to the ground of the live wire was a pure accident occasioned by the thunder-storm and wind, and that in the circumstances it was the inevitable result of the exercise of its franchise and statutory powers. In my opinion, the evidence adduced by it falls short of accomplishing that purpose. There was no inevitable necessity which compelled it in the original construction of the line to string its wires in close proximity to the branches of trees; and, supposing the original construction to have been faultless in that regard, it is manifest that from growth of the trees, or from some other cause, the situation had become in

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fact dangerous without its being observed by the defendant's inspectors, and it is not shewn that the cost of adequate inspection would be prohibitive. In any case the onus was on the defendant to establish that if it supplied electrical current on Carling-avenue accidents of this character were inevitable, and the analysis of the evidence by my brother Fisher (which I need not here repeat) convinces me that it has failed to meet the onus which lay upon it. I would dismiss the appeal with costs.

ORDE, J.A., agreed that the appeal should be dismissed.

FISHER, J.A.:—Appeal by the defendants from the judgment entered by Mr. Justice Kelly on the answers of the jury in an action for damages for negligence.

The appellants were, under 57 & 58 Vict. (Dom.) ch. 111, empowered to construct, erect, maintain, and operate wires along the sides of and across and under public highways, streets, etc., and to supply electric current thereby, subject to the terms and provisions set out in the Act. Clause (e) of sec. 8 provides that "the company shall be responsible for all damage which their agents, servants or workmen cause to individuals or property in constructing, carrying out or maintaining any of the said works in this or the next preceding section authorised."

What happened in this case and what the plaintiffs proved was that about 6 p.m. on the 4th August, 1928, the infant plaintiff, as he was walking along the north side of Carling-avenue, in the city of Ottawa, fell on a live wire belonging to the defendant company, which had broken and fallen on the sidewalk near the Lady Grey Hospital, and his left hand was so badly burned that four of his fingers had to be amputated.

The jury's only finding of negligence reads: "We consider the wire was defective, wires running close to trees should have a more thorough inspection;" and they assessed damages at \$100 to the father and \$10,000 to the infant plaintiff.

My brother Kelly in his reasons for judgment on the defendant's motion for a nonsuit pointed out that all persons dealing in electricity must exercise the highest degree of skill, care, and foresight, not only in the construction but in the inspection, repair, and operation of the apparatus and appliances, and referred to *Royal Electric Co. v. Hévé*, 32 Can. S.C.R. 462, and *Young v. Town of Gravenhurst*, 22 O.L.R. 291 and 24 O.L.R. 467.

There is no contradiction of the defendant's evidence that the plant was constructed with the best materials and in accordance with the highest standards of engineering and experts, but the difficulty, in my opinion, gathered from a careful reading of the

evidence, is, that the defendant failed in at least two important particulars in the performance of its duties. First, in running the highly charged wire which broke and fell through the limbs of a growing tree, and in not giving a closer and more thorough inspection of the line whilst the plant was in operation. The faulty construction, as I view it, consisted in the running of a highly charged wire through and between the limbs of a tree, and thereafter in failing to keep the limbs cut away so that it would not be possible during wind-storms that any contact should take place between the wire and the limbs of the tree. Every one knows that during a period of 5 years the branches of a tree will grow larger and larger, and during the many wind-storms which would take place during that period this highly charged electrical wire would be in contact with the limbs of the tree, with the inevitable result that there would be a gradual weakening of the wire and ultimately a break.

The evidence of Clements, a witness called by the defendant, to my mind is on this point conclusive. He was asked if he "could see from the condition there what had caused it to fall," and his answer was, "There was a limb which indicated a burn on it, and that limb had caused the two wires to come together and caused them to short circuit and caused it to come down;" and he made the following answer to question 1: "When two wires come together that are alive it will cause a short circuit and burn either one off or burn the two off at one time or sometimes one at a time." And to a question he made the following answer: "Q. You did not see the wire until you arrived at the scene? A. No, but if there was a wire broken, from its own condition there would only be the one fall, and not the occasion of the two going at the same time. *It chanced that a branch had put these two wires together and caused it to burn and drop down.*"

It may be that the practice has always been to run wires through the branches of trees; but, if such wires cannot be constructed and maintained with the greatest safety above ground, they should be placed below the ground, and it is no answer to say that, to avoid trees altogether or to put wires under the ground would greatly increase the cost of construction.

The defendant company was organised and carried on as a commercial undertaking for the purpose of gain; and, if it was not prepared to run its line altogether free of growing trees or to obtain permission to cut down all trees in the path of its line, it was, in my opinion, under a bounden duty, for the safety of all persons using the streets, to put the wires under the ground, or to keep the branches of the trees so far from the wires that there could be no possible contact during storms.

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I think the point I am now discussing is what the jury had in mind and what they meant when they found as the act of negligence "that the wire was defective, wires running close to trees should have a more thorough inspection." There is no evidence whatever to sustain a finding that the breaking of the wire in question was due to a violent storm over which the defendant had no control. The storm was an ordinary thunder-storm, accompanied by some wind, and was not proved to have been an extraordinary storm.

Then there is failure to make a proper inspection. There is no evidence by the defendant that it made any inspection of this particular tree to see whether the branches were in close contact with the wire. The only evidence of inspection was by casual observations from time to time from the ground, and Burke, the defendant's inspector, made answer to the following question: "But how long before the accident had you inspected that line?" A. Well, it was after that inspection that I put in a report that the poles were leaning—on August 26th, 1928."

The defendant's electrical system having been constructed by it and being entirely under its control, and the fact being that its servants took possession of the wire and repaired it about an hour after it broke and fell, and, being in possession of all the surrounding circumstances, I am of opinion that the plaintiffs were entitled to rely, as apparently they did throughout the trial, upon the maxim *res ipsa loquitur*; that the defendant has failed to satisfy the onus cast upon it; and that the jury was fully justified in drawing the inference that the contact of the limbs of the trees with the wire caused it to break.

As an authority for the application of the maxim *res ipsa loquitur* I refer to *Wing v. London General Omnibus Co.*, [1909] 2 K.B. 652, and what Fletcher Moulton, L.J., said at p. 663:—

"In my opinion the mere occurrence of such an accident is not in itself evidence of negligence. Without attempting to lay down any exhaustive classification of the cases in which the principle of *res ipsa loquitur* applies, it may generally be said that the principle only applies when the direct cause of the accident, and so much of the surrounding circumstances as was essential to its occurrence, were within the sole control and management of the defendants, or their servants, so that it is not unfair to attribute to them a *primâ facie* responsibility for what happened."

The defendant has not objected to the finding as to contributory negligence, or that the amount of the damages awarded is too large, and for the reasons I have given I would dismiss this appeal with costs.

RIDDELL, J.A.:—In this action the statement of claim sets out that the infant plaintiff, proceeding along a street in Ottawa, slipped and fell on a live wire belonging to the defendant company, then lying on the sidewalk, and was injured; and this injury was caused by the negligence of the defendant. Particulars were asked for but not furnished; a motion for particulars was not successful, and the parties came down to trial at Ottawa before Mr. Justice Kelly and a jury.

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At the opening of the case the plaintiffs' counsel, at the suggestion—it can scarcely be called a direction—of the learned trial Judge, said:—

“My evidence will be as follows: that a live wire belonging to the defendant company had fallen on the highway about 6.20 p.m.; that the defendant company was notified immediately that a live wire was lying exposed on the highway; that the infant plaintiff was proceeding along Carling-avenue about 7 o'clock the same evening and fell on this live wire and sustained these injuries. One act of negligence we complain of is the unreasonable length of time this wire was allowed to remain on the highway and the unjustifiable delay in failing to despatch a repair-car or some one to guard the live wire so as to obviate the possibility of accident or injury to travellers on the highway. Then I submit that it is an act of negligence on the part of the defendant company to allow a live wire to lie exposed on the highway.”

He made it quite clear that he desired to rely upon the maxim *res ipsa loquitur*; and that he did not abandon his claim based thereon by stating what he proposed to prove. The learned trial Judge did not compel him to elect whether to proceed on the maxim or upon definite acts of negligence, nor did we; and the argument before us proceeded on the hypothesis that, notwithstanding his statements at the trial, counsel could utilise the maxim as he saw proper and so far as the facts proved justified its application.

At the trial it was proved that a live wire of the defendant company was lying on or near the sidewalk on an Ottawa street during a somewhat heavy storm, that the infant plaintiff fell, and placed his hand upon it, and was injured.

The jury were charged to put down every respect in which they found negligence, and, after a careful charge, they brought in the following answers:—

“1. Was there any negligence by the defendant (that is the Ottawa Electric Company) which caused injury to the plaintiff Leo Crepin? A. Yes.

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"2. If there was such negligence by the defendant, state fully and clearly what was or were the act or acts or omission or omissions which constituted such negligence? A. We consider the wire was defective, wires running close to trees should have a more thorough inspection.

"3. Was there any negligence of the plaintiff Leo Crepin which caused or contributed to his injury? A. No."

The defendant company appealing finds no fault with the amount of the verdict or with the finding as to contributory negligence; but says that there was no negligence on its part.

Substantially as though the maxim applied, the defendant company called evidence; this, by wholly uncontradicted statements of those who were well qualified to speak on the subject, shewed that the line was a new one, in very good condition, well constructed, with wires so strong that they never break down with any storm, but only by a short circuit, as any wires will, no matter of what kind. "It is built in accordance with the standard specifications of the American Institute of Electrical Engineers, the highest in practice on the American Continent, and there is no better line in the locality. The line was of the best material available and in perfect condition."

There is absolutely no evidence so much as indicating that a more frequent inspection would have made the slightest difference, and it is impossible to support the finding in that regard.

The casualty was not to be expected, and I can find nothing to charge the defendant with negligence. Accidents will happen, and I can find no default in not providing against this one, caused, as it apparently was, by the storm driving one wire against the other and creating a "short circuit."

Assuming, without deciding, that the plaintiffs may rely upon the maxim *res ipsa loquitur*, I think the defendant has fully met the onus cast upon it.

I would allow the appeal with costs and dismiss the action with costs.

Appeal dismissed (RIDDELL, J.A., dissenting.)

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Constitutional Law—Bankruptcy Act, secs. 5, 159—Bankruptcy Rules 91, 92—Form 14—Intra Vires—B.N.A. Act, sec. 91(21)—Interim Receiving Order—Undertaking as to Damages Given to Court—Enforcement by Court—Jurisdiction of Registrar in Bankruptcy.

The provisions of the Bankruptcy Act, R.S.C. 1927, ch. 11, and Bankruptcy Rules 91 and 92, relating to the appointment of interim receivers, are within the legislative jurisdiction of the Parliament of Canada, by virtue of sec. 91(21) of the British North America Act, and are not an interference with property and civil rights in the Province (sec. 92(3)).

The undertaking as to damages required by the Court of the applicant for an interim receiving order in bankruptcy is given to the Court, and may be enforced by the Court, notwithstanding that the bankruptcy proceedings are at an end by reason of the setting aside of the receiving order.

The Registrar in Bankruptcy has no power to assess the damages sustained by the alleged debtor by reason of the interim receiving order.

Judgment of WRIGHT, J. (1930), 65 O.L.R. 154, affirmed.

AN appeal by William J. Sutterby from the judgment of WRIGHT, J. (1930), 65 O.L.R. 154.

October 22. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

G. T. Walsh, K.C., for the appellant, argued that the Registrar in Bankruptcy had power to assess the damages, under Rule 92 of the Bankruptcy Act. But, if he had not such power, he had been constituted an arbitrator by consent of parties, and so his judgment could not be reviewed in appeal. If the appeal should be dismissed, the appellant would have no remedy, as the time limited by the Act for applying for assessment of damages would have expired. The judgment of the learned Registrar was right and should be restored. Reference to *Re Jackson* (1926), 58 O.L.R. 482; 1 C.E.D. (Ont.), p. 388.

J. M. Bullen, for the Attorney-General for Canada, contended that the Dominion Parliament had power to pass the legislation contained in the Bankruptcy Act to enforce the undertaking given by the respondent company to the Court. Such legislation came under sec. 91 of the British North America Act, and was not an interference with property and civil rights. It was legislation ancillary to the proper working out of the functions of the Court. The Court had jurisdiction to remedy the wrongful use of the Act. The party giving the undertaking gave it to the Court, not to the other party. Reference to *Toronto Corporation v. Canadian Pacific Railway Co.*, [1908] A.C. 54; Cameron on the Canadian

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Constitution, vol. 1, pp. 78, 80, 82; *Smith v. Day* (1882), 21 Ch. D. 421; *Grand Trunk Railway Co. of Canada v. Attorney-General of Canada*, [1907] A.C. 65; *Larue v. Royal Bank of Canada*, [1926] S.C.R. 218.

Edward Bayly, K.C., and *W. B. Common*, for the Attorney-General for Ontario, contended that the legislation was *ultra vires* the Dominion Parliament, as an interference with "property and civil rights in the Province" under sec. 92 of the British North America Act. As in the case at bar there was no bankruptcy of the appellant, the Bankruptcy Act did not apply, and so the Bankruptcy Court had no jurisdiction.

Gordon Shaver, K.C., for the Pilot Automobile and Accident Insurance Company Ltd., petitioning creditor, respondent, argued that the Registrar had no power to assess the damages, for the reasons stated by Wright, J., and the appeal should therefore be dismissed. Reference to *Dominion Cannery Ltd. v. Costanza*, [1923] S.C.R. 46; *Re Bartram* (1930), 65 O.L.R. 182.

December 5. RIDDELL, J.A.:—On the 30th October, 1928, the Pilot Automobile and Accident Insurance Company applied for and obtained the appointment of an interim receiver of the estate of Stuart & Sutterby, under sec. 5 of the Bankruptcy Act and Rules 91 and 92, the order reciting, "the said applicant by its counsel undertaking to abide by any order this Court may make as to damages in case it shall hereafter be of opinion that the debtors shall have sustained any by reason of this order, which the applicant ought to pay"

This order was vacated on the 7th November, 1928, and the debtors, claiming to have suffered damage which the applicant should pay, obtained an assessment of them by the Registrar, who on the 31st May, 1929, fixed them at \$2,217. Upon an appeal to Mr. Justice Wright, that learned Judge set aside the award, upon the ground that the Registrar had no jurisdiction to make it. Upon the debtor Sutterby appealing to this Court, the question was raised that the legislation authorising the award of damages to the complaining debtor was *ultra vires* the Dominion. That point was consequently argued before us, and falls to be decided, as well as the points raised before the learned Judge from whom this appeal was taken.

The legislation, the validity of which is called in question, is R.S.C. 1927, ch. 11, an Act respecting Bankruptcy, which was passed under the powers alleged to be given the Dominion by the British North America Act, sec. 91(21), by which "the exclusive legislative authority of the Parliament of Canada" is made to

extend to "bankruptcy and insolvency." The argument as to its invalidity is, on the other hand, based upon sec. 92(13), whereby "the Legislature" of the Province "may exclusively make laws in relation to . . . property and civil rights in the Province"—the Attorney-General for the Province contending that what is provided for in the Dominion Act is an interference with "property and civil rights in the Province."

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I think that the situation has been wholly misconceived. I can find no interference with any rights of the respondent or of any one else. Examining the legislation, we find an Act of the Dominion dealing with bankruptcy, which is admittedly within its legislative powers; then a Court is provided as necessary to carry out any scheme of bankruptcy legislation—in Ontario, the Supreme Court, sec. 152(a)—"to exercise original, auxiliary and ancillary jurisdiction in bankruptcy."

A creditor is not compelled to come into this Court for relief; no compulsion appears; he may sue in the ordinary courts for his claim, and the application for a receiver is a voluntary act upon his part; he is not deprived of any right of property or otherwise by the legislation; his rights are secure; all the legislation in question does is to give him a further means of obtaining payment of his claim against his debtor.

The creditor may apply for the appointment of an interim receiver without there having been any adjudication of bankruptcy, and the Court *may* appoint one accordingly; there is no obligation upon the Court to appoint any more than there is upon the Court to grant an interim injunction; and, if the applicant, in order to induce the Court to appoint an interim receiver, agrees that he will pay such damages as the Court shall think he should pay in the event of the ultimate failure of his proceedings, I am unable to see how there is any want of equity in holding him to his undertaking. I repeat, this is not an interference with his property or civil rights; it is simply holding him to what he has agreed to when inducing the Court to take the property of another out of his hands before he has been declared a bankrupt. The power of requiring such an undertaking was found necessary to the proper working of the Court of Chancery, and I am of the opinion that it is a valuable auxiliary, if not ancillary, to the proper working of any Court which may require to consider the granting of such sequestrations, just as it is when an interim injunction is asked for.

The argument that the provision for giving damages in case the debtor is not declared bankrupt is not legislation concerning

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bankruptcy, because there is no bankruptcy, is specious but unsound; as well say that when a person is charged with a crime the legislation as to procedure, etc., is not criminal law, for there was no crime. The legislation is for cases where insolvency is charged, even if there is no insolvency, and consequently is legislation concerning insolvency, just as legislation concerning what is to be done when a crime is charged is criminal legislation, even if no crime should ever be committed.

The right to make general rules is expressly given by sec. 161 of the Act to the Governor in Council. That this conferred upon the Governor in Council plenary powers in the premises cannot be disputed; but I find it unnecessary to determine whether, in the absence of an undertaking by the applicant for an interim receiver, Rule 92 is effective to give the debtor damages. That case will be determined if and when it arises, but it is not the present case.

The Court, I think, is called upon, on the failure of the applicant to establish his case, to carry into effect the undertaking upon the giving of which the interim order was granted, and the Court should make an order. The Court should "adjudicate with respect to any damages" the applicant should pay. I can find nowhere in the jurisdiction given to the Registrar, any power so to make an order or to adjudicate. Section 159 is very specific; and it is only orders made by the Registrar in exercise of his real powers and jurisdiction that are to be deemed orders of the Court: sec. 159(4).

I think that the judgment of Mr. Justice Wright should be supported upon the grounds I have stated, and that this appeal should be dismissed with costs.

It will be seen that my judgment on the first point proceeds on the ground that the applicant's rights were not at all interfered with, but it was given an opportunity to make a quasi-contract, if it wished.

LATCHFORD, C.J., agreed that the appeal should be dismissed with costs.

MASTEN, J.A.:—The essential facts to be considered on this appeal sufficiently appear from the reasons for judgment prepared by my brother Riddell and need not be here repeated.

With respect to the lack of jurisdiction alleged to exist on the part of the learned Registrar, I agree with the conclusion of my brother Wright in the Court below, and with the reasoning by which he supports it, and I have nothing to add. This suffices

to dismiss the appeal; but, as it is contended on constitutional grounds that the Bankruptcy Court has no jurisdiction to enforce the undertaking given by the petitioning 'creditor, the Pilot Automobile and Accident Insurance Company, when obtaining the order for an interim receiver, and as it must be assumed that the appellant will renew his claim for damages in a proper forum, and as the question of the jurisdiction of the Bankruptcy Court to try the appellant's claim has been fully argued before us, it seems to me to be desirable, in the hope of avoiding hereafter a re-argument of that question, to express the opinion at which I have arrived with regard to the jurisdiction of the Bankruptcy Court.

Mr. Bayly, for Ontario, argues that, as there was not in point of fact any bankruptcy or any insolvency of the alleged debtors, the Bankruptcy Act has no application, and consequently the Bankruptcy Court has no jurisdiction. It may be quite true that the appellant was not an adjudged bankrupt, and that he was not in fact insolvent; nevertheless there was a proceeding instituted in the Bankruptcy Court against the appellant. The respondent voluntarily instituted that proceeding, haled the appellant into that court, and obtained in that court an order depriving the appellant of the possession of his property by the appointment of an interim receiver. Thus, though there was no bankruptcy or insolvency, there was a proceeding in the Bankruptcy Court for which the respondent is responsible. In that proceeding the respondent came to the Court asking the appointment of an interim receiver. Thereupon the Court says to him, "If it should turn out on fuller investigation that the order sought by you ought not to have been granted, all the Court could do would be to set aside the present order with costs, but the appointment of an interim receiver may do the alleged debtor great injury, and, in order to provide a remedy in that event, the Court requires as a condition of granting you an order for an interim receiver that you give to the Court an undertaking "to abide by any order this Court may make as to damages in case it shall hereafter be of opinion that the debtor (the present appellant) shall have sustained any by reason of this order which the applicant (the respondent) ought to pay."

I think that the argument that the Bankruptcy Court has no jurisdiction to award damages arises from a failure to appreciate fully the nature and effect of the respondent's undertaking. Such an undertaking is well-known and has long been exacted in Chancery, and afterwards in the Supreme Court, as a condition of the grant of an interlocutory injunction. and accordingly I refer to

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In *Tucker v. New Brunswick Trading Co. of London* (1890), 44 Ch. D. 249, at p. 252, it was held that an undertaking is required merely as a condition of granting the injunction, for the Court has no jurisdiction to compel a party to give an undertaking.

In *Smith v. Day*, 21 Ch. D. 421, at p. 428, Brett, Lord Justice, dealing with such an undertaking, says: "Now in the present case there is no undertaking with the opposite party, but only with the Court. There is no contract on which the opposite party could sue."

The view so expressed by Brett, L.J., appears to have been uniformly accepted in subsequent cases.

The undertaking remains in force though the action is dismissed; *Newby v. Harrison* (1861), 3 DeG. F. & J. 287; or though the plaintiff has discontinued his action: *Newcomen v. Coulson* (1878), 7 Ch. D. 764.

Newby v. Harrison is so directly in point that I venture a fuller reference. It was an appeal from the decision of Vice-Chancellor Wood, who had refused to direct an inquiry as to what damages had been sustained by the defendants in consequence of the granting of an injunction, where the usual undertaking had been given and the suit had thereafter been dismissed. Mr. Rolt appeared for the appellants, and in the course of his argument said that the Vice-Chancellor held that he had no jurisdiction to make an order, there being now no suit before the Court, and continued, "What we contend is, that the Court has jurisdiction over the plaintiff by virtue of his undertaking, and that there is no reason for holding the engagement into which he entered with the Court to be determined by the dismissal of his bill." Sir Hugh Cairns appeared for the respondent and argued that there was no authority for making such an order as was asked for, after the dismissal of a bill and while no suit was pending. Lord Justice Knight Bruce says, at p. 289: "I am of opinion that the jurisdiction of the Court is not lost by reason of the dismissal of the bill, and that the undertaking continues in force, and therefore is enforceable by the order of the Court." And Lord Justice Turner, on the same page, says: "I agree with the Vice-Chancellor Wood in thinking this a question of importance; for if the dismissal of the bill puts an end to such an undertaking as that now before us, all those undertakings which are given upon the occasion of injunctions being granted and many other undertakings

given in causes are useless, and the precautions which the Court has taken for the protection of the persons against whom the orders are made are nugatory. The true principle appears to me to be this, that a party who gives an undertaking of this nature puts himself under the power of the Court, not merely in the suit but absolutely; that the undertaking is an absolute undertaking that he will be liable for any damages which the opposite party may have sustained, in case the Court shall ultimately be of opinion that the order ought not to have been made. After a party has voluntarily entered into such an undertaking, it does not lie in his mouth to say that, because the suit is out of Court, the Court has no jurisdiction over him; for the jurisdiction does not arise from the suit but from his own undertaking."

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It thus appears that the undertaking is not with the party injured but with the Court, which on that condition only granted the order for an interim receiver, and it becomes the duty of the Court to which the undertaking was given to enforce the undertaking on behalf of the party injured. When the damages have been ascertained, if they are not paid, the remedy would be by proceedings for contempt for breach of the undertaking, and not by an execution at the suit of the opposing party, and such enforcement would necessarily be by the Court named and referred to in the undertaking.

Rule 91 of the Bankruptcy Rules provides in express terms for the appointment of an interim receiver, and further that the Court may, if it thinks fit, impose such terms as may be just when making such an appointment. The rule so expressed is clearly within the limits of bankruptcy legislation, and therefore within the purview of sec. 91 of the British North America Act.*

The term which the Bankruptcy Court deemed just in this case was that as a condition of granting the order for an interim receiver, the petitioning creditor should give the undertaking in question to the Court, and it is that Court and that Court only

* Bankruptcy Rules 91 and 92 read as follows:—

91. After the presentation of a petition, upon the application of a creditor or a debtor and upon proof by affidavit of sufficient grounds for the appointment of an interim receiver of the property of the debtor or any part thereof, the Court may, if it thinks fit and upon such terms as may be just, make such appointment; such order may be made *ex parte*.

92. Where, after an order has been made appointing an interim receiver, the petition is dismissed, the Court shall, upon application to be made within twenty-one days from the date of the dismissal thereof, adjudicate with respect to any damages or claim thereto arising out of the appointment, including the proper remuneration of the interim receiver, and shall make such order as the Court thinks fit.

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which is to express its opinion as to the damages, if any, which have been occasioned by the making of the order. Thus the whole proceeding, including the enforcement of the undertaking, is a proceeding in bankruptcy, not even ancillary but actually direct.

ORDE, J.A.:—I agree with the conclusions of my brother Riddell.

The jurisdiction given to the Parliament of Canada “to make laws . . . in relation to . . . bankruptcy and insolvency” must, if such legislation is effectively to accomplish its purpose, include the power to make conservatory orders for the preservation of the assets of the alleged bankrupt pending the proceedings necessary to his being so adjudicated. The appointment of an interim receiver to take possession of the assets is clearly within that power. And the validity of the appointment, or of the power so to appoint, cannot be dependent upon the ultimate success or failure of the petitioning creditor who seeks to make his debtor a bankrupt.

The exaction from the petitioning creditors of an undertaking as to damages, as a term or condition upon which the order is granted, is probably inherently within the power of the Court, following the practice in Chancery when granting interlocutory injunctions. But it is to be noted that the undertaking is specially provided for in Form No. 14 appended to the Bankruptcy Rules, so that there is, in addition, the express authority of the Rules, with their statutory sanction, for the practice.

What, then, is the effect of the dismissal of the petition for the receiving order? The creditor has, of course, failed in his attempt to make the debtor bankrupt. But is the undertaking, which is an undertaking to the Court, to become sterile and of no avail? Though I had some doubt during the argument, I have come to the conclusion that, notwithstanding that the proceedings to declare the debtor bankrupt are at an end, the Court must still retain the power, as necessarily incidental to the original proceeding in bankruptcy—a proceeding which was and must remain perfectly lawful and valid—to dispose of such matters resulting from the making of the order as would ordinarily fall to the Court to deal with. One of such matters would be the consequences of the undertaking given by the petitioning creditor.

I am of the opinion, therefore, that the Supreme Court of Ontario has the power, sitting in bankruptcy, to deal with the damages arising from the undertaking just as fully as if the undertaking had been given upon the granting of an interlocutory injunction.

This is not to say that by this course of procedure damages for an alleged malicious attempt to put the debtor into bankruptcy can be awarded. Such damages, if recoverable at all, must of necessity be the subject of an action. The damages in the bankruptcy proceedings must be such as flow from the undertaking; and the grounds upon which they are to be awarded, and the measure thereof, must be determined upon proper principles.

As to the jurisdiction of the Registrar in Bankruptcy to try the question or to direct such a trial before himself or otherwise, I agree fully with the judgment of Wright, J., which is now in appeal before us. Notwithstanding some ambiguities in the language of the Act and Rules, it is clear that it was never intended by the Act to confer upon the Bankruptcy Registrar all the powers in bankruptcy matters of a Judge of the Supreme Court of Ontario.

The appeal should be dismissed with costs.

FISHER, J.A., agreed that the appeal should be dismissed with costs.

Appeal dismissed.

[APPELLATE DIVISION.]

UNBRIDGE HARDWARE CO. LTD. V. MUSSELMAN.

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Attachment of Debts—Garnishing Proceedings in Division Court—Division Courts Act, secs. 118, 138, 149—Claims under Equitable Assignments to Moneys Attached—Priorities—Times of Issue and Service of Summons—Appeals from Judgments in Division Court—Amounts Involved—Jurisdiction of Appellate Court.

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M. made an arrangement with an auctioneer to sell her chattels on the 27th November, 1929. Before that date she gave to a creditor a letter addressed to the auctioneer asking him to pay to the creditor a specified sum of money out of the proceeds of the sale to be held on the 27th November. By the same document M. purported to assign to the creditor the specified sum out of the proceeds of the sale. She gave similar documents to other creditors, and all were delivered to the auctioneer before the day of the sale:—

Held, that these documents were valid equitable assignments; the subject-matter of the assignments was assignable in that way; and the claims of the assignees were paramount to the claims of the plaintiffs in four Division Court actions, who sought to garnish the proceeds of the sale in the hands of the auctioneer (garnishee).

The garnishee summons was issued before but not served till after the debt sought to be garnished accrued:—

Held, that the rights of the garnishors must be determined as at the time of the issue and not of the service of the summons.

Requisites of an equitable assignment discussed and authorities reviewed.

The primary creditors in the four actions appealed from the judgments pronounced in the Division Court, but two of the appeals were dis-

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missed, on a preliminary objection that the amount claimed in each did not exceed \$100: Division Courts Act, sec. 118. The appeals were not reduced to one appeal although all the actions were (by consent) tried together.

APPEALS by the primary creditors in garnishing plaints in the 4th Division Court of the County of Ontario from the judgments of THOMPSON, Co. C.J., declaring that certain assignments made by the primary debtor of portions of the fund in the hands of the garnishees were valid as assignments or equitable assignments, and that the assignees, the claimants, were entitled to priority over the primary creditors, the appellants.

November 19. The appeals were heard by LATCHFORD, C.J., RIDDELL, MASTEN, and FISHER, JJ.A.

W. F. Greig, for the appellants.

F. L. Button, for the claimants, respondents, took the preliminary objection that in the cases of Lapp and Law, appellants, the claims were under \$100 and so could not be appealed.

Greig contended that, as all the cases (four) had been tried together by consent, they were all one case, and so the one appeal covered them all.

THE COURT, however, on the authority of sec. 118 of the Division Courts Act, dismissed the appeals of Lapp and Law, and the argument proceeded on the appeals of the Uxbridge Hardware Company and W. H. Littlejohn.

Greig argued that the assignments were not good equitable assignments and should not take precedence over the garnishing proceedings, referring to *Olson v. Machin* (1912), 4 O.W.N. 287; *Hall v. Prittie* (1890), 17 A.R. 306; *Re Matthews Sheet Metal and Roofing Co. Ltd.* (1924), 55 O.L.R. 262; *London and Yorkshire Bank Ltd. v. White* (1895), 11 Times L.R. 570.

Button contended that the judgment below was right, and that the assignments were perfectly good and should have precedence, citing *Walker v. Bradford Old Bank Ltd.* (1884), 12 Q.B.D. 511; *Tailby v. Official Receiver* (1888), 13 App. Cas. 523; *Alexander v. Steinhardt Walker & Co.*, [1903] 2 K.B. 208.

December 5. LATCHFORD, C.J.:—There is no dispute regarding the facts involved in these appeals, which turn solely on a rather simple question of law.

In this and each of three similar cases by other creditors of Mrs. Lena Musselman, a summons in garnishee proceedings under sec. 138 of the Division Courts Act, R.S.O. 1927, ch. 95, was duly issued on the 27th November, 1929. The garnishees in all the

cases were the auctioneer and his clerk, who, on the same day, were conducting for the primary debtor a sale of her effects.

Service was made upon Marquis and his clerk after the sale, when the proceeds were still in his hands. Previously there had been delivered to them or to one of them, the auctioneer apparently, three orders, each signed by Mrs. Musselman, directing the auctioneer and his clerk to pay out of the proceeds of the sale to the appellants certain fixed amounts which in their total exceeded the sum realised at the sale. Two of the orders were also express assignments. The third, while not an assignment in form, is in law an equitable assignment. It mentions the fund on which it was drawn, and thus complies with the requirement mentioned by Bacon, V.-C., in *Percival v. Dunn* (1885), 29 Ch. D. 128. See also *Kelly v. Wilson* (1903), 2 O.W.R. 508, a judgment of a Divisional Court; see also the observations of Lord Macnaghten in *William Brandt's Sons & Co. v. Dunlop Rubber Co.*, [1905] A.C. 454, at p. 462.

In addition to delivering their orders and assignments, Forsythe and the other assignees gave formal notice to the auctioneer and his clerk of their claims upon the funds in hand, and then applied under sec. 149 of the Act to be allowed to shew cause "why the debt sought to be garnished should not be paid or applied in or towards satisfaction of the claim of the primary debtor(s)."

The learned County Court Judge held that the assignments were valid and a first charge upon the funds in the hands of the auctioneer, and therefore dismissed the proceedings against the garnishees.

The primary creditors appeal. On a preliminary objection raised by Mr. Button, the Court dismissed the appeals in two of the cases, those of Lapp and Law, as the amount claimed in each did not exceed \$100: Division Courts Act, sec. 118.

Argument then proceeded on the appeals on behalf of the Uxbridge Hardware Company and W. H. Littlejohn, Mr. Greig contending that their garnishee proceedings prevailed over the orders and assignments, and Mr. Button contending that the judgment of his Honour Judge Thompson was right.

The assignments, on the authorities mentioned, and on many others which might be cited, render it clear that the orders and assignments are valid and constitute a charge on the proceeds of the sale prior in time and in right to the garnishee proceedings.

The appeals should therefore be dismissed with costs.

RIDDELL, J.A.:—The primary debtor was carrying on a farm near Uxbridge; and, finding herself in difficulties, determined to

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sell; she made an arrangement with her auctioneer, Marquis, for him to sell her chattels on the 27th November, 1929. Before the date of the proposed sale, she gave to a creditor a document as follows:—

“To W. F. Marquis, Esq., Auctioneer.

“And to the Clerk of our sale advertised for Wednesday, Nov'r 27th, 1929.

“Please pay to Eleazor Forsyth the sum of three hundred and forty-four dollars and fifty cents (\$344.50) out of the proceeds of our sale to be held on the above date, and for so doing this shall be your sufficient warrant and authority, and we hereby assign to the said Eleazor Forsyth the said sum of \$344.50 out of the proceeds of the said sale.

“Mrs. Lena Musselman.

“Francis Musselman.”

She gave similar documents to three other creditors before the sale-date; and all four documents were delivered to Marquis before the day of the sale. That these documents are sufficient to operate as an equitable assignment is not disputed, if the subject-matter of the assignments is assignable in that way.

These four assignees are the intervenants in the present proceeding, and their rights depend upon the effect, if any, of these documents.

The auction sale proceeded; and, after the money had come into the hands of the auctioneer—or the clerk for him, with his knowledge—garnishee summonses, issued that day, were served upon him.

At the trial, the learned Judge held that the assignments were valid and took precedence of the garnishments.

The primary creditors appealed in all four cases. It was found that two of the cases involved less than \$100, and for that reason, they not being appealable, the appeals were dismissed; we were unable to give effect to the argument of counsel that they were all one case, as they were tried together by consent. This did not make them any the less four cases, each with its own evidence and adjudication.

The appeal proceeded in the other two, and they are now to be adjudicated upon.

That the plaintiffs have a clear right to judgment against the primary debtor is not disputed; but the intervenants, coming in under sec. 154 of the Division Courts Act, R.S.O. 1927, ch. 95, claim that their rights are paramount.

A great deal of argument was made before us as to the efficacy, if any, of a garnishee summons, issued before but not served till

after the debt sought to be garnished accrued. As at present advised, I think that, just as the rights of a plaintiff are to be determined as of the date of the writ, and not as of the date of its service, so the rights of a garnishor must be determined as of the time of the issue and not of the service of the summons—that is, these rights cannot be placed higher, although, of course, the debt is bound only from the service. So, in the Supreme Court, before an order of attachment or garnishment can be made, the creditor must swear that “some person . . . is indebted to the judgment debtor” (Rule 590), not that “some one is going to be indebted” to him.

A great deal has been said and written as to the field for equitable assignments; it seems to me to be well indicated in the judgment of Mr. Justice Osler in *Brown v. Johnson* (1885), 12 A.R. 190, at p. 197, that there must be a fund, either actually in being or about to arise in the ordinary course of events, that is, either actually or potentially in the hands of the person upon whom the order is given. We need not consider whether, this coming into his hands, must necessarily be in consequence of a contract, as in the present case there was a contract between the debtor and the auctioneer which “in the ordinary course of events” would cause a fund to be in the hands of the latter to which she was entitled. Such was the case in *Lett v. Morris* (1831), 4 Sim. 607, where a contractor gave an order upon the other party to be paid out of moneys to come to him under his contract. The fact that he had to do something before the fund was created was of no consequence, if, in fact, the fund was created.

The present case strictly complies with the requisition laid down in *Hall v. Prittie*, 17 A.R. 306, at p. 310, “a specific appropriation of . . . some part of . . . a fund which is to arise out of some existing contract or agreement.”

The whole doctrine as to equitable assignments is discussed in the notes to *Ryall v. Bowles* (1747), 1 W. & T.L.C. in Eq. 90, 96 *et seq.*, and need not be restated.

The case of *Gurnell v. Gardner* (1863), 9 Jur. N.S. 1220, is one of a number of cases in which the money to arise from the sale of goods was considered a fund against which an equitable assignment might be made.

I think the appeal should be dismissed with costs.

MASTEN and FISHER, JJ.A., agreed with the Chief Justice and with RIDDELL, J.A.

Appeal dismissed.

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[APPELLATE DIVISION.]

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JACKSON v. PENFOLD.

Dec. 5.

Attachment of Debts—Garnishee Claim in Division Court—Proceeds of Sale of Growing Crops—Contract of Sale not Filed—Bills of Sale and Chattel Mortgage Act, R.S.O. 1927, ch. 164, sec. 20—Adverse Claim of Mortgagee of Land and Chattels—Bailment—Wrongful Sale by Bailee—Waiver of Tort and Affirmation of Sale by Bailor—Division Courts Act, R.S.O. 1927, ch. 95, sec. 149.

The A. D. Board lent money to P., a farmer, taking a mortgage on his land and a chattel mortgage on his chattels, in April, 1929. The chattels were described as "the crops grown or to be grown, during the continuance of this security or any renewal thereof, on the said lands." The chattel mortgage also contained a clause declaring that the intention was that the mortgage should "attach on the crops in every stage until their maturity and after their maturity whether severed or not from the realty." And the schedule attached contained the words, "All growing crops." P. had, in the previous February, entered into a contract with the H. company for the sale of tomatoes to be grown on his land. The contract was not filed and was unknown to the Board. When his tomatoes ripened, P. delivered them to the H. company, and received on the company's books credit for the price. In September, 1929, the plaintiff brought an action in a Division Court against P., making the H. company garnishee. In October, the Board notified the H. company that the proceeds of the sale belonged to the Board, and demanded it. The Board was then brought in as claimant under sec. 149 of the Division Courts Act:—

Held, that the contract with the H. company was "a sale" within the Bills of Sale and Chattel Mortgage Act, sec. 20, and, not being filed, was not effective against creditors.

The Board had, under the land mortgage, the legal property in the tomatoes while they were attached to the freehold; and this could not be divested from the Board and vested in P. by his severing them.

P., being bailee for the Board of the tomatoes, sold them; the Board, on discovering that its bailee had disposed of its property, had the option of suing for a tort or of waiving the tort and claiming the sale-price; and its demand of the price from the H. company shewed that it waived the tort and affirmed the sale.

And, under the provisions of sec. 149, it was declared that the Board had shewn just cause why the debt sought to be garnished should not be applied in or towards satisfaction of the claim of the primary creditor.

AN appeal by the Agricultural Development Board, claimant, from the judgment of MAHON, Co.C.J., in the Fifth Division Court of the County of Essex, dismissing the claim of the appellant Board, made in a garnishing proceeding.

October 23. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

Edward Bayly, K.C., and W. B. Common, for the appellant Board, said that it claimed the moneys in the hands of the Heinz

Company, the garnishee, under a chattel mortgage made by the primary debtor to the Board. These moneys were not garnishable by the primary creditor as against the claim of the Board as chattel mortgagee. The sale of the primary debtor's crop of tomatoes was not a sale in the ordinary course of business such as is allowed to chattel mortgagors in mercantile transactions. The contract between the primary debtor and the Heinz Company was a bill of sale and was void as against the Board, chattel mortgagee, for want of registration. Reference to *Regina v. Thomas* (1870), 22 L.T.R. 138.

Percy W. Beatty, K.C., for the primary creditor, respondent, contended that the judgment below was right. Reference to *National Mercantile Bank Ltd. v. Hampson* (1880), 5 Q.B.D. 177; *Joseph v. Lyons* (1884), 33 W.R. 145; *Dedrick v. Ashdown* (1888), 15 Can. S.C.R. 227, especially at p. 243.

December 5. The judgment of the Court was read by RIDDEL, J.A.:—This case, as it seems to me, has been entirely misconceived in the Court below, as it was by the respondent before us. It falls, in my opinion, to be determined on elementary principles; and few, if any, of the cases cited have any bearing.

The facts are simple: the Agricultural Development Board, a corporation created on the authority of the Agricultural Development Act, R.S.O. 1927, ch. 58, lent money to the primary debtor Penfold, taking a mortgage on his lands and a chattel mortgage on his chattels, on the 23rd April, 1929, the chattels being described:—

"The crops growing or to be grown during the continuance of this security or any renewal thereof on the said lands."

There was also the following clause:—

"And also all seed grain and other seed or vegetables for seeding purposes now upon or which may hereafter be upon the said lands, and also the crops and produce of every description, whether grain, hay, clover, tobacco, vegetables or fruit now in process of growth, or which may hereafter be in process of growth, upon the said lands, during the continuance of this security and any renewal thereof, and whilst the said lands are in possession of the mortgagor and after as well as before the last day hereinafter provided for payment, until the mortgage is fully paid, the intention being that this mortgage shall attach on such crops in every stage until their maturity and after their maturity whether severed or not from the realty."

And the schedule attached contains these words: "All growing crops."

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Penfold had in the previous February entered into a contract with the Heinz Company for the sale of tomatoes to be grown on his land, which contract was not filed, and was wholly unknown to the Board. When his tomatoes ripened, he delivered them to the Heinz Company and received on their books credit for \$334.30; Jackson, in September, 1929, issued a summons in the Fifth Division Court against Penfold, making the Heinz Company garnishee; the Board, on the 5th October, notified the Heinz Company that the proceeds of the sale belonged to the Board, and demanded it; the Board was then brought in under sec. 149 of the Division Courts Act.

At the trial, it was held that the money was owing to and the property of Penfold; the Board now appeals.

The contract for sale to the company is "a sale," within the Bills of Sale and Chattel Mortgage Act, R.S.O. 1927, ch. 164—sec. 20—and, to be effective against creditors, should be filed—sec. 7. This was not done and the document may be disregarded so far as it might affect the appellant Board.

The simple position is that the Board had, under the land mortgage, the legal property in the tomatoes while they were attached to the freehold; this could not be divested from the Board and vested in Penfold by his severing them—so that all the learning as to the legal and equitable property in after-acquired property may be left to the side. Penfold, being bailee for the Board of these tomatoes, sold them. That he sold them wrongfully is wholly immaterial—the bailor, on discovering that its bailee had disposed of its property, had the option of insisting on a tort having been committed and suing in trespass and trover; or it might waive the tort and claim the sale-price. Its demand of the price from the Heinz Company shews conclusively that it waived the tort and affirmed the sale.

Such cases as *Dedrick v. Ashdown*, 15 Can. S.C.R. 227, *Bridgman v. Robinson* (1904), 7 O.L.R. 591, *Commercial Credit Co. v. Fulton Bros.* (1922), 65 D.L.R. 699, *Gordon Mackay & Co. Ltd. v. Larocque* (1926), 59 O.L.R. 293, *National Mercantile Bank Ltd. v. Hampson*, 5 Q.B.D. 177, so confidently relied upon, are *nihil ad rem*; assuming that Penfold had the right to sell as he did, there is no case that goes farther than to say that he was not violating his covenant not to sell, and that he could give a good title to his purchaser. There is no case that so much as suggests that, if he did sell and his bailor claimed the sale-price, thereby affirming his sale, he would be entitled, as against it, to receive the sale-money from his vendee. The real owner of the

tomatoes coming in, affirming the sale and demanding the proceeds, Penfold has no right as against it to receive the proceeds.

I think that the appellant Board has shewn "just cause why the debt sought to be garnished should not be paid to or applied in or towards satisfaction of the claim of the primary creditor" and that, under the salutary provisions of sec. 149 of the Division Courts Act, we should so declare.

The appellant should have its costs throughout paid by the primary creditor.

December 16. *R. H. Sankey*, for the primary creditor, respondent, called the attention of the Court to *Bloomfield v. Hellier* (1895), 22 A.R. 233, and asked leave to reargue the case.

Bayly, K.C., for the appellant Board, was not called upon.

THE COURT refused the application.

[APPELLATE DIVISION.]

RE SOLICITORS.

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Dec. 5.

Solicitors — Bill of Costs for Drawing Will — No Agreement as to Amount — Mention of Probable Amount — Failure to Notify Client in Course of Preparation of Will that Amount Mentioned would be Exceeded — Discretion of Taxing Officer — Refusal to Interfere with.

The solicitors rendered to a client a bill of costs amounting to \$750 for services in drawing a will for the client. Upon taxation, the taxing officer allowed the amount charged. Upon appeal by the client to a Judge in the Weekly Court, the amount was reduced to \$400; but, upon the solicitors' appeal to the Appellate Division, the \$750 was restored:—

Held, that there was no agreement as to the amount, and no obligation upon the solicitors to state to the client during the course of preparation that their original rough estimate of the probable amount of their bill, before they had entered upon the work, which proved to take 90 hours of the time of one of the solicitors in consultations, drafting, revising, redrafting, etc., was inadequate; and that the amount of the bill as rendered was not excessive.

The discretion of the taxing officer should not be interfered with, unless in very special circumstances, and here there were none.

Re Solicitors (1912), 27 O.L.R. 147, *Orpen v. Attorney-General for Ontario* (1925), 57 O.L.R. 164, and other authorities, referred to.

AN appeal by the client from the report of the taxing officer upon a taxation against the client of a bill of costs for drawing the client's will.

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June 25. The appeal was heard by RANEY, J., sitting in Weekly Court, Toronto.

Gordon Waldron, K.C., for the client.

G. W. Mason, K.C., for the solicitors.

July 11. RANEY, J.:—This is an appeal by the client from the report of the taxing officer at Toronto allowing the solicitors \$750 as a fee for drawing the client's will.

The parties were strangers on the 31st July, 1929, when the client came to the door of the solicitors' office and inquired of a member of the firm what his charge was for drawing a will. The solicitor's recollection is that his answer was: "Sometimes it is \$5, sometimes \$25. It all depends on what is to be done." The client's recollection is that the solicitor said, "From \$25 to \$50;" and, in answer to a further question as to whether \$50 would be the maximum fee, the client says that the solicitor answered that it would. At all events on that date the client produced a copy of his proposed will that had been prepared by another solicitor. There was a lengthy conference on that day and several later conferences and several drafts of a new will were made, and finally, after several weeks, a lengthy new will was signed. Then the solicitor rendered a detailed bill shewing 90 hours of time occupied in consultations and in the work of preparing the will, and at the foot of the bill are these words, "90 hours, fees at \$10 per hour, say \$750." Of the 90 hours the solicitors says that not less than 24 were occupied in consultations, leaving 66 hours for the other items of the bill—drafting and redrafting and arranging the clauses of the document, perusing and revising it, and consulting authorities on points of law involved in the client's instructions. For this last item there could, of course, be no charge against the client. Whether a fiction or not, clients are entitled to assume that solicitors know the law.

Since, at all events, the Solicitors Act of 1912, 2 Geo. V. ch. 28, sec. 49, a solicitor may make an agreement with his client respecting remuneration for future services, and by the same Act, sec. 44, it was provided (see R.S.O. 1927, ch. 194, sec. 46), that "the taxing officer, in taxing a bill for preparing and executing any instrument, shall consider not the length, but the skill and labour employed and the responsibility incurred in the preparation thereof."

Accepting the evidence of the solicitor, the taxing officer has found that there was no contract with the client. That leaves the case to be determined under the statute—unless there is some

other intervening consideration. I think there is another consideration.

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Accepting the solicitor's version of the conversation on the client's first appearance at his office, the solicitor then gave him a definite estimate of what his fee would be, up to a point, and after that depending upon "what is to be done." The indefinite maximum then mentioned by the solicitor was \$25. The solicitor's bill shews that on the first day the conference lasted $4\frac{1}{2}$ hours. At \$10 an hour this meant \$45 for the client's first visit. The next charge is for a consultation on the 7th August, 3 hours, and the third item of the bill is for a consultation on the 8th August, 5 hours—in all for those three consultations $12\frac{1}{2}$ hours, which at \$10 an hour would be \$125, or five times the solicitor's maximum estimate, as given to the client before the first consultation began. Then, after two hours more of "instructions" on the 27th August, the redrafting of the will was commenced, according to the bill.

Speaking of this aspect of the case, the taxing officer remarks:—

"I have more than once said that where a solicitor finds that a client is occupying so much of his time that a bill out of proportion to the importance of the business in hand is likely to result, he should intimate to the client that that is the situation, but," the taxing officer adds, "I hardly think that this applies to the case before me."

With deference, I should have thought that there were special reasons why this principle should apply. The bill as rendered may or may not be out of proportion to the importance of the solicitor's services in the present case, but that is not the present point. The point is that the bill is clearly out of proportion to the estimate which the solicitor says he gave the client of what the probable costs of his services would be, and the principle is the same as that in the case stated by the taxing officer. The client's question to the solicitor was an intimation to him that the client wanted some idea of the solicitor's probable charge before going ahead. The solicitor was a total stranger, and the client wanted to know what liability he was incurring. Whether the client was rich or not, he was entitled to know, and after the first interview of $4\frac{1}{2}$ hours the solicitor ought to have spoken or written to him pointing out that he had already incurred a bill amounting to almost twice the solicitor's maximum estimate; and, if the solicitor ought to have done that after the first consultation, much more ought he to have done it after the second consultation, and still more after the third. Solicitors are officers

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of the Court and they are to be held closely to the best and fairest business methods. It is possible, of course, that the procedure I have suggested might have frightened this client off. But it might merely have had the effect of causing him to curtail his demands upon the solicitor's time. Whatever the consequences might have been, there is no doubt, I think, as to what was the solicitor's duty.

On the other hand, the client in the present case is, it is said, an intelligent man of long business experience, and could not reasonably have expected to occupy so much of the solicitor's time as he did for \$50, which he says was the absolute maximum of his liability as he understood it. Perhaps he did not know that the solicitor was spending more than a whole week's time on the drafting and revising the will, but he did know of the 24 hours spent in the solicitor's office in consultations, and he would know that \$50 would not be an adequate remuneration for the solicitor for the time occupied with him in consultations alone, to say nothing of the drafting and revising.

At the close of the argument I asked Mr. Waldron what he thought the client ought to pay. He said \$300, or \$400. That answer relieves me from considering the matter further, because, under all the circumstances, taking into account the provisions of the statute, the estimate given by the solicitor to the client, his failure to revise his estimate when he came to know what was expected of him, and the fact that the solicitor was furnished with a draft will that had been prepared by another solicitor—I certainly should not have allowed the bill at more than \$400. As it is, I allow it at that figure.

The appeal will be allowed to the extent I have indicated. There will be no costs of the taxation, and the client will have the costs of the appeal.

The solicitors appealed from the order of RANEY, J.

November 17. The appeal was heard by LATCHFORD, C.J., MAGEE, RIDDELL, and FISHER, JJ.A.

G. W. Mason, K.C., for the appellants, argued that the evidence did not shew that the solicitors gave the client a definite or maximum estimate of what the charge would be to draw his will. The Court should not interfere with the taxing officer's decision as to quantum, but only in regard to errors in matter of principle: *Re Solicitor* (1908), 12 O.W.R. 1074; *Re Solicitors* (1912), 27 O.L.R. 147. Even as to quantum, considering the length of time consumed in the preparation of the will, the skill and labour employed, and the responsibility incurred, the sum

allowed by the taxing officer was reasonable. Reference to *Orpen v. Attorney-General for Ontario* (1925), 57 O.L.R. 164.

G. T. Walsh, K.C., for the client, respondent, contended that the charges were exorbitant. The solicitor had told the client that \$50 would be a maximum charge. If, after this, the solicitor found it would be much more expensive, he should have so informed the client. There was no necessity for the solicitor to spend so much time on the work. The client had provided him with a draft which formed a basis for preparing the will. The Court had power to interfere with the discretion of the taxing officer as to quantum: *Flexlume Sign Co. v. Globe Securities Co.* (1918), 44 O.L.R. 277. The judgment appealed from should be sustained.

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December 5. LATCHFORD, C.J.:—This is an appeal by solicitors from the judgment of Mr. Justice Raney of the 11th July, 1930, reducing to \$400 the \$750 fixed by the taxing officer as a proper fee to be allowed to the solicitors for drawing the will of Mr. A. J. H. Eckhardt. The solicitors were deprived of their costs of the taxation and directed to pay the costs of the appeal.

With great respect, I am of opinion that the judgment should be wholly reversed.

While it would doubtless have been more prudent for the member of the appellant firm, when his time was occupied by the client in consultations alone for more than 24 hours, to have stated that his original estimate of his fee for drawing the will of a total stranger to him could no longer be regarded as adequate. However, no obligation rested upon him to do so. The original draft presented was of little, if any, use; and repeated drafts, seven in all I think, and almost as many revisions, were made, dealing with a very large estate. Not a few of the many bequests proposed were of an unusual character. Others suggested or insisted upon were of doubtful validity, entailing consideration of authorities—for example, those dealing with the law against perpetuities and the powers of municipal councils and other organizations.

The duty of the taxing officer was to determine what costs were properly chargeable between the solicitor and his client and properly payable by the client to his solicitor. Much evidence was adduced on both sides. The reasons for the finding arrived at indicate that certain evidence was credited and certain evidence discredited. On the evidence which the taxing officer believed, he was fully warranted in the finding at which he arrived. The law is, I think, correctly stated by Garrow, J.A., in *Re*

App. Div. *Solicitors*, 27 O.L.R. 147, at p. 159, to this effect: if the matter
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RE merely a question of amount, the Court should not interfere.
SOLICITORS. Other cases might be cited.

Latchford, I, therefore, think the appeal should be allowed with costs
C.J. and the appellants allowed their costs in the Court below and
of the taxation.

MAGEE, J.A.:—The will drawn by the solicitor is of unusual length, apparently between 90 and 100 folios, and the number of beneficiaries probably exceeds 100, many bequests giving pecuniary legacies to different public bodies and societies and persons, with much detail requiring time and care beyond their importance and evidently originating with the client. The instructions began on the 31st July, and the will was executed on the 8th November, with interviews on different dates in August, September, and October. The solicitor puts the number of hours engaged with the client at not less than 24; and, as he charges for 90 hours, the remaining time was occupied in drafting the will and re-drafting it or parts of it several times and perusing and revising it and considering and deciding on questions of law involved, besides the actual transcription. For this he rendered a bill for \$750 which the taxing officer allowed in full. Mr. Justice Raney has reduced this to \$400.

The Courts do not lightly interfere with the taxing officer's judgment and discretion; but, if the amount fixed by my learned brother, with his wide experience, is a reasonable amount, it cannot be said that the allowance of \$750 was not such an injustice as called for and warranted the disturbance of the officer's decision. The judgment and discretion of the learned Judge should as little be disturbed on appeal as that of the officer. The latter, it is true, had before him the witnesses; but, as it is found that there was in fact no bargain for a fixed sum or for a maximum, that contact is of little or no advantage. It comes to a question then whether \$400 or \$750 is the more reasonable sum and less unjust to be allowed, or some amount between the two. The fact that my Lord the Chief Justice and the other members of the Court consider \$750 to be a proper sum justifies a finding that it is so, and therefore a restoration of the taxing officer's ruling. As no offer of any sum beyond \$50 already paid was made to the solicitors, they should have their costs throughout.

RIDDELL, J.A.:—The taxing officer, on taxation of a solicitors' bill of costs for drawing a will, allowed the sum of \$750; on

appeal, Mr. Justice Raney reduced the amount to \$400; the solicitors now appeal. App. Div.

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The facts of the transaction are deposed to by the solicitor, M., the client, E., and the solicitor's clerk, A. We, of course, had not the advantage of seeing the witnesses, and, consequently, we are wholly unable to say that the taxing officer, who did see them, is wrong in crediting the solicitor and his clerk and in discrediting the client. Accepting the story of the solicitor, corroborated as it is by his clerk, I think the learned Judge appealed from is fundamentally wrong in the bases upon which he founds his judgment.

The following seems to be what happened: Mr. E., wishing, for some reason, to change his existing will, went to the solicitor, and, after some talk as to his skill, asked him what it would cost to draw a will. He was told "sometimes \$5, sometimes \$25, sometimes more, it just depends on the amount of work in the matter." (The taxing officer's book shews that the answer did not stop with "sometimes \$5, sometimes \$25; it all depends on what is to be done," as the transcript of the evidence has it).

He had a will drawn; a bill was rendered for \$750, the client paid in \$50 as sufficient, and on the taxation set up a contract for a fee of \$50. The taxation proceeded; the taxing officer took evidence and had no hesitation in discrediting the client; as has been said, he allowed the bill at \$750, giving somewhat elaborate written reasons for his conclusions.

On the appeal, it is obvious that the learned Judge was much influenced by what he thinks was "a definite maximum," mentioned on retainer by the solicitor. He uses the expressions—"the solicitor gave him a definite estimate of what his fee would be up to a point;" "The definite maximum then mentioned by the solicitor was \$25; the solicitor's definite maximum estimate, as given to the client before the first consultation began." From what has been said of the evidence, it is a misnomer to speak of the solicitor having given "a definite estimate," "a definite maximum," or anything that was definite or not dependent upon the amount of work that was to be done. Had it not been for this error, it seems likely that the learned Judge would have followed the rule laid down in more than one case in this Court.

As to the proposition that the bill should be reduced by reason of the assistance afforded by the will or draft will given to the solicitor by the client, I wholly agree with the observation of my brother Fisher during the argument, that that was in all probability more of a hindrance than an assistance; any help it could

App. Div. afford would be infinitesimal and may well be left out of consideration.
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SOLICITORS. *Orpen v. Attorney-General for Ontario*, 57 O.L.R. 164, at p. 165,
Riddell, J.A. where, speaking of appeals from the taxing officer, this language is used:—

“The rule to be followed in such appeals has long been settled both in England and in Ontario—many cases are given in Holmsted’s *Judicature Act* (1915), notes on Rule 509, pp. 1126 and 1127.

“The Court must necessarily possess a general jurisdiction over the taxing officer, in all matters, to prevent wrong to parties; but no countenance can be given to the proposition that, where he has not made any mistake in principle and the sum awarded is not so grossly large or small (as the case may be) as to be beyond all question improper, the Court will interfere with the discretion of the taxing officer: *Re Solicitor*, 12 O.W.R. 1074, at p. 1075; *Re Solicitors*, 27 O.L.R. 147, at pp. 153, 154.

“If the matter could properly be regarded . . . as not involving any principle, but merely a question of amount . . . I for one would not think of interfering.” per Garrow, J.A., in 27 O.L.R. at p. 159. And the Court of Appeal decided in the latter case that the law was properly laid down in the former, in words already quoted in effect.

“As is said in *Brown v. Sewell* (1880), 16 Ch. D. 517, “The Taxing Master’s decision as to the amount of counsel’s fees will not be interfered with unless a gross mistake is made.

“See *Conmee v. North American Railway Contracting Co.* (1890), 13 P.R. 433, and cases cited in the cases in 12 O.W.R. and 27 O.L.R.”

This rule we reiterated in *Flexlume Sign Co. v. Globe Securities Co.*, 44 O.L.R. 277, at p. 283, where we reaffirmed the general rule that the discretion of the taxing officer cannot be interfered with as to quantum, adding that “the Court is not precluded from so interfering in very special circumstances” and holding that such “very special circumstances” did exist in that case, setting them out *seriatim*.

In the present case, I can find no special circumstances when the facts are rightly understood; and think that there is no sound reason for interfering with the discretion of the taxing officer. Moreover, I am satisfied with his estimate of the amount that should be taxed to the solicitors.

I think that the appeal should be allowed with costs throughout, including the costs of taxation. App. Div.
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Even had we been of the opinion that the amount should have been only \$400, I can see no reason for depriving the solicitor of the costs of taxation—he had to go on with the taxation, in order to obtain anything more than \$50, and, at the worst, he is to receive eight times as much. There is no good reason for depriving him of these costs. RE
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FISHER, J.A., agreed with RIDDELL, J.A.

Appeal allowed.

[APPELLATE DIVISION.]

LAWRENCE v. FINCH.

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Dec. 5.

Libel and Slander—Dictated Letter Sent by Defendant to Plaintiff—Publication to Stenographer—Charges of Stealing Information and Unethical Conduct—Qualified Privilege—Failure to Establish—Damages—Costs—Whether Tort Found Libel or Slander.

The defendant dictated to his stenographer a letter addressed and sent to the plaintiff, who had formerly been employed by the defendant in his business as a real estate agent in the city of W., and who, at the date of the letter, was carrying on business in the same city as a “realtor” on his own account. The plaintiff brought an action for libel and slander, based on the statements in the letter, (1) that he had called on a customer of the defendant with a view to selling him some property and that the only way the plaintiff could get this man’s name and address was “by secretly stealing” it from the files,” and (2) that the plaintiff was guilty of “unethical practice.” The defendant did not justify, but denied the publication, said that the words were not defamatory, and also that they were contained in a letter from the defendant to the plaintiff in the ordinary course of the defendant’s business, *bonâ fide* and without malice, and under a sense of duty, in the honest belief that they were true; and he claimed privilege:—

Held, that the first statement did not mean that the plaintiff was charged with theft, a crime punishable by imprisonment—the only thing that could be reasonably supposed to be meant was that the plaintiff was guilty of improper conduct in getting possession of the names of the customers of the defendant, and that was not a crime in the sense that a charge of it would be a charge of a crime within the meaning of the rules governing defamation.

The second statement was an imputation upon the plaintiff in the way of his vocation and touching his calling, and the words were actionable without proof of special damage.

The fact that the plaintiff and defendant were each engaged independently in business as real estate agents in W. is not a basis upon which a defence of qualified privilege can be founded. The defendant might have an interest in the ethics of the real estate business

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LAWRENCE v. FINCH. *Simmonds v. Dunne* (1871), I.R. 5 C.L. 358, and *Hebditch v. MacIrvine*, [1894] 2 Q.B. 54, applied.
Per RIDDELL, J.A.:—The excess in the language employed destroyed the privilege, if any existed.
However, all that the defendant was liable for was the publication to his own stenographer, and the damages assessed at the trial should be reduced from \$500 to \$5 and costs on the Supreme Court scale.
Semble, the tort was slander, not libel.
Osborn v. Thomas Boulter & Son, [1930] 2 K.B. 226, referred to.

AN appeal by the defendant from the judgment of GARROW, J., who (by consent) tried the action without a jury, in favour of the plaintiff for the recovery of \$500 damages in an action for libel and slander. The alleged defamatory words were contained in a letter sent by the defendant to the plaintiff, dictated by the defendant to his stenographer.

November 3. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

R. L. Kellock, for the appellant.

H. S. Rosenberg, for the plaintiff, respondent.

December 5. RIDDELL, J.A.:—The statement of claim sets out that the defendant “falsely and maliciously” spoke and published to one Olga Mahler, stenographer, certain defamatory words, which will be considered later, and that this publication was “by the dictation to her by the defendant of a letter addressed to the plaintiff.” No other publication is alleged in the pleadings, and consequently some of the matter pressed on us on the argument of the appeal becomes wholly immaterial.

The fact is that Olga Mahler is a stenographer in the employment of the defendant, and he dictated to her the letter complained of, in the regular course of her employment and the regular course of conducting correspondence in his business. That she afterwards sent the letter so dictated to the plaintiff is not alleged in the pleadings, although the plaintiff swears that he received it; we may consider that the only publication complained of is that to the girl.

The statement of claim sets out that the plaintiff, being at the time a real estate agent, carrying on business as such, and the defendant another “realtor” in Windsor, published to the stenographer the words following:—

“January 14, 1929.

“Mr. J. W. Lawrence, 1014 Gladstone Ave., Windsor, Ontario.

“Dear Mr. Lawrence: I have been advised by Mr. A. R. Baxter

that you called on one of our Detroit clients with a view to selling him some property. This particular client was a party with whom you had nothing to do whatever when you were connected with us, and the only way you could get his name and address would be by secretly stealing it from our files.

"If the information which I have obtained is not true, in justice to yourself you should inform us. You had no right to go through our private records and make any list of names and addresses. Actions of this kind are, of course, strictly contrary to the code of ethics adopted by all real estate boards and is also contrary to common honesty and decency, and I would dislike to believe that you would be guilty of such an action.

"For your own good, I wish to advise you of a complaint which Mr. Paul Robarts, of Foster & Robarts, made to me a week or two ago with reference to a certain action of yours. At the time Mr. Robarts gave me this information I am under the impression that he was not aware that you had left my employ. You no doubt know to what I am referring, and if you were connected with any member of the real estate board you would be quickly brought up on the carpet for such crude and unethical practice.

"Yours very truly,

"H. J. Finch & Co., per H. J. Finch."

It is alleged that the defendant meant that "the plaintiff had been guilty of unethical conduct in the carrying on of his business as a real estate agent;" and also that he meant that the plaintiff had committed a crime punishable by imprisonment, "namely the crime of theft."

The defendant did not justify, but, denying the publication, he said that the words were not defamatory, and also that they were "a letter from the defendant to the plaintiff in the ordinary course of the defendant's business, *bonâ fide* and without malice towards the plaintiff, and under a sense of duty, in the honest belief that they were true;" and he claims privilege.

The action came on for trial before Mr. Justice Garrow without a jury, both parties, by a practice that is apparently growing and certainly tends to a proper decision, waiving the right to a trial by jury.

Dealing with the allegations in the statement of claim, the claim that the words employed charge a crime punishable with imprisonment is based upon the first part of the letter, in which the plaintiff is charged with "secretly stealing." Had there been no other words, it is plain that this would be a charge of theft, larceny, a crime punishable with imprisonment, and consequently the statement of claim would be justified in that particular.

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But it is perfectly clear that what was meant, and the only thing that was meant or could reasonably be supposed to be meant, was the improper conduct of the plaintiff—as alleged—in getting possession of the names of the customers of the employer. This, however objectionable and “unethical,” was not a crime in the sense that a charge of it would be a charge of crime within the meaning of the rules governing defamation: *McDonald v. Mulqueen* (1922), 53 O.L.R. 191; 3 C.E.D. (Ont.), p. 576.

As to the other contention, I am clearly of opinion that the language of the latter part of the letter is an imputation upon the plaintiff in the way of his vocation and touching his calling; consequently, these words are actionable without proof of special damage.

That the occasion may have been one of qualified privilege, as I am inclined to think, is immaterial, for the excess in the language employed destroys the privilege, if any would otherwise exist—I think the defence of qualified privilege fails.

It is wholly unnecessary to decide whether the defamatory words constitute libel or slander, the result is the same—language was published by the defendant of the plaintiff touching his calling; the defence of privilege fails; and the plaintiff is rightly entitled to a verdict.

But, under the circumstances of this case, I think the damages awarded by the trial Judge wholly out of proportion to the damage that could possibly be suffered by the plaintiff. All the defendant is liable for is the publication to his own stenographer; any further damage, if any, would come from the plaintiff himself publishing the defamatory words.

I think that nominal damages alone should have been assessed, and would allow the appeal to the extent of reducing the judgment to \$5 and costs on the Supreme Court scale; no costs of this appeal, the success being divided. I have not thought it necessary to determine whether the words constituted a libel or only a slander; we heard the point fully argued, and I am of opinion that the tort is a slander, preferring the view of Scrutton and Slessor, L.J.J., to that of Greer, L.J., in *Osborn v. Thomas Boulter & Son*, [1930] 2 K.B. 226. This, however, forms no part of the *ratio decidendi* of this judgment. The decision of the Court of Appeal in that case is referred to in a note in 46 L.Q.R. p. 395, in which the very learned annotator says that the better opinion seems to be that such words so spoken to a typist or copy clerk, in the ordinary course of business, would be only slander.

MASTEN, J.A.:—This is an action for defamation, tried by consent by Garrow, J., without a jury, at Sandwich, in which judg-

ment passed in favour of the plaintiff for \$500 with Supreme Court costs. App. Div.

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In this case I agree with the conclusion proposed by my brother Riddell, namely, that the plaintiff's judgment should be reduced to \$5 with Supreme Court costs.

Masten, J.A.

The trial Judge appears to have found the defendant guilty of libel, but on that question I concur with the view expressed by my brother Riddell. I think that the evidence establishes slander and not libel, and that the slander consisted in defamation of the plaintiff in the way of his vocation and touching his calling, so that proof of special damage (of which there was none) is not necessary.

I concur with the other views expressed by my brother Riddell, except on one point. I agree with the trial Judge that the defence of qualified privilege was not established by the defendant. The onus of clearly establishing in evidence the facts necessary to found the qualified privilege rests on the defendant. The rule in that regard is stated in *Gatley on Libel and Slander*, 2nd ed., p. 743, as follows:—

“Where the defendant relies on the defence that the words were published on a privileged occasion, he must prove the facts and circumstances necessary to create the privilege, unless they are already in evidence, i.e. he has succeeded in establishing them in cross-examination of the plaintiff or his witnesses.”

The rule so enunciated is well supported by the statement of Lord Esher, Master of the Rolls, in *Hebditch v. MacIlwaine*, [1894] 2 Q.B. 54, at p. 58.

In *Simmonds v. Dunne* (1871), I.R. 5 C.L. 358, Baron Fitzgibbon, at p. 362, says:—

“But the question whether the occasion is privileged is a question of law; and, therefore, when this defence is pleaded, the facts necessary to shew that the occasion is privileged must be stated. It must appear that the subject-matter of the communication complained of is one in which the defendant and the party to whom he made the communication had corresponding interests or duties.”

And that decision is referred to with approval in *Gatley*, 2nd ed., p. 560, and also in *Odgers*, 6th ed., p. 251.

The facts so required to be set forth in the defendant's defence must be clearly established by the evidence. Here the evidence fails, in my opinion, to establish that the defendant and the plaintiff were members of a society or guild in which they had corresponding interests. It is true that there is some suggestion that the plaintiff had been an associate member of the Realtors Association in Windsor, but the evidence fails to establish that he was a

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member of that organisation on the 14th January, 1929, when the defamation here in question took place. It is established that the plaintiff and defendant were each engaged independently in business as real estate agents and brokers in Windsor or its vicinity; but, in my opinion, that fact does not form a basis on which a defence of qualified privilege can be founded. The defendant may have had an interest in the ethics of the real estate business of Windsor, but there is nothing to indicate that the plaintiff had a corresponding interest. If one member of the Law Society of Upper Canada were to slander another member of that ancient and honourable society by dictating to his stenographer a letter addressed to the plaintiff accusing him of practising his profession in a manner which was unethical and improper, he could not in my opinion establish that the occasion was privileged merely because the sender and the receiver of the letter had, or ought to have had, a common interest in the ethics of the legal profession. If such a principle were to be established, I can see no reason why it would not apply in the case of two butchers, or bakers, or candlestick-makers, doing business in the same locality.

I would hold that the defendant has failed to establish his defence of privilege.

I agree that there should be no costs of this appeal.

LATCHFORD, C.J., and ORDE and FISHER, J.J.A., agreed with MASTEN, J.A.

Appeal allowed in part.

[APPELLATE DIVISION.]

1930.

REX v. WRIGHT.

Dec. 11.

Criminal Law—Magistrate's Conviction for Non-Support of Child—Criminal Code, secs. 241, 242—Child Living with Mother—Divorce Obtained by Mother—Absence of Legal Duty of Father to Support Child—Offer of Father to Maintain Child in his Home.

The defendant's wife, the mother of his 8-year old daughter, obtained a divorce from him in May, 1930, and since that time, as well as for a year or more before, she had been living apart from him, the daughter living with her, although her custody had not been awarded to either parent. An action, brought by the mother, as next friend of the daughter, against the father, to enforce an alleged civil obligation to maintain the child, was dismissed; and thereafter an information was laid against him for non-support of the child, and he was convicted by a police magistrate of the offence charged:—*Held*, upon appeal from the conviction, that, as the defendant had not "charge" of the child, sec. 241 of the Criminal Code could not be relied upon as establishing the "legal duty" necessary to found the offence of which he was convicted.

Held, also, that sec. 242, subsec. 3(a), did not meet the case, as the defendant was not the "head of a family" of which the infant was a member.

Under subsec. 3(b), the existence of a legal duty to provide necessities is a condition precedent to criminal liability; and there is no such legal duty under the civil law of Ontario (*Childs v. Forfar* (1921), 51 O.L.R. 210), and no such legal duty has been imposed by the criminal law.

And for these reasons the conviction was quashed.

Semble, that an offer made by the defendant to receive the child into his home and maintain her would not be sufficient to negative his liability for non-support, if any existed—for the family atmosphere and environment of his home might not be conducive to her moral welfare.

AN appeal by the defendant from his conviction by the Police Magistrate for the City of Oshawa, under sec. 242 of the Criminal Code, for non-support of his infant child, Dorothy, aged 8 years.

November 12. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

A. H. *Hall*, for the appellant, stated that an action brought against him in a Division Court seeking to enforce against him an alleged civil obligation to provide necessities for the child had been dismissed. The existence of a "legal duty" to provide necessities is a condition precedent to criminal liability under sec. 242, subsec. 3, of the Criminal Code. The Crown failed to shew that a legal duty was imposed upon the appellant. Section 241 of the Code is not applicable, as the appellant has not charge of the child. He has not refused to provide the child with necessities. No evidence was given to prove that the child is in necessitous circumstances. Reference to *Childs v. Forfar* (1921), 51 O.L.R. 210, and *Rex v. Leroux* (1928), 62 O.L.R. 336, 340.

W. B. *Common*, for the Crown, admitted that there is no civil liability resting upon a father to maintain or provide necessities for his infant child, but contended that there is a criminal liability at common law, in certain circumstances, and that this criminal liability has been provided for by secs. 241 and 242(3) of the Criminal Code: Russell on Crimes and Misdemeanours, 8th ed., vol. 1, pp. 868 and 869. It is the father's duty to provide food and clothing for his children: *Childs v. Forfar*, *supra*, at p. 216; *Rex v. Yuman* (1910), 22 O.L.R. 500; *Rex v. Lewis* (1903), 6 O.L.R. 132. The mother is unable to support the child, and the child, not being able to support herself, is in necessitous circumstances. There was a duty upon the appellant to inquire into the child's circumstances: *Algiers v. Tracey* (1916). 30 D.L.R. 427, at p. 429.

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December 11. GRANT, J.A.:—This is an appeal from the Police Magistrate for the City of Oshawa in respect of a conviction pronounced by him against the accused on the 23rd October, 1930, whereby the accused was found guilty of “non-support” in respect of his infant child Dorothy Wright (about 8 years of age), and was sentenced to three months’ imprisonment. The information was laid under the provisions of sec. 242(1), (3), of the Criminal Code, which reads as follows:—

1. “Every one who as parent, guardian or head of a family is under a legal duty to provide necessities for any child under the age of 16 years is criminally responsible for omitting, without lawful excuse, to do so while such child remains a member of his or her household, whether such child is helpless or not, if the death of such child is caused, or if his life is endangered, or his health is or is likely to be permanently injured, by such omission.

2. . . .

3. “Every one is guilty of an offence and liable upon indictment or on summary conviction to a fine of \$500, or to one year’s imprisonment, or to both, who,

“(a) as a husband or head of a family, is under a legal duty to provide necessities for his wife or any child under 16 years of age; or

“(b) as a parent or guardian, is under a legal duty to provide necessities for any child under 16 years of age;

“and who, if such wife or child is in destitute or necessitous circumstances, without lawful excuse, neglects or refuses to provide such necessities.”

The circumstances are somewhat peculiar. The child’s mother obtained a divorce from the accused on or about the 31st May, 1930, and since that time, as well as for a year or more prior thereto, she has been living separate and apart from him, the child living with her. There does not appear to have been any proceeding whereby the custody of the child has been awarded to either of the parties, but she has been living with her mother. At some time shortly before this prosecution was launched, an action was brought in a Division Court by the mother, as next friend of the infant, against the accused, the child’s father, seeking to enforce against him an alleged civil obligation to maintain the child. That action was dismissed. Thereafter an information was laid under the above recited section of the Criminal Code, in consequence of which a conviction was registered, from which this appeal has been taken.

It appears from her evidence that the mother is not at present in such a financial position as would enable her properly to provide for the child’s food and clothing.

The principal ground of appeal is that, under the circumstances, the accused is under no civil liability to provide for his infant daughter; that he is not under a "legal duty," within the meaning of the appropriate section of the Code, to provide for the infant; that the criminal liability, upon which the conviction is sought to be supported, is conditioned upon the existence of a "legal duty," and that, therefore, there being no such "legal duty," the conviction cannot stand.

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With great reluctance I am compelled to the conclusion that the contention put forward on the part of the accused is well-founded.

That there is no civil liability, according to the law of this Province, resting upon a father to maintain or provide necessaries for his infant child has been decided in numerous cases. Reference may be had to the decision of a Divisional Court in *Childs v. Forfar*, 51 O.L.R. 210, in which the earlier cases were referred to.

There was a criminal liability at common law under certain circumstances, and, under the same circumstances, there is a criminal liability explicitly provided for by sec. 241 of the Code and also by sec. 242(3a). By sec. 241 it is provided that "every one who has charge of any other person, unable by reason . . . of . . . age . . . or any other cause, to withdraw himself from such charge, and unable to provide himself with the necessaries of life, is . . . under a legal duty to supply that person with the necessaries of life, and is criminally responsible for omitting, without lawful excuse, to perform such duty if the death of such person is caused, or if his life is endangered, or his health has been or is likely to be permanently injured by such omission."

It is apparent that the case at bar does not come within the definition just given, as the accused has not charge of the infant, and this section cannot be relied upon as establishing the "legal duty" necessary to found the offence for which a conviction has been registered.

So, also, sec. 242(3a) does not meet the case, as the accused is not the "head of a family" of which the infant is a member, as apparently is contemplated by this section. As was recognised by counsel for the Crown, if it can be supported at all, the conviction must be supported under 242(3b). That subsection, however, only renders guilty of the offence one who, "as a parent or guardian, is under a legal duty to provide necessaries . . . and who, if such . . . child is in destitute or necessitous circumstances, without lawful excuse, neglects or refuses to provide such necessaries." The existence of a legal duty to provide necessaries is a condition precedent to criminal liability under this subsection. Unless the legal duty already exists by law, either under some

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other provision of the Code, or otherwise, there cannot be any criminal liability under this subsection. As has already been noted, there is no such legal duty under the civil law of this Province, and no such legal duty has been imposed by the criminal law. I am, therefore, forced to the conclusion that the foundation necessary to support the charge under sec. 242(3b) is lacking, and that the conviction must therefore be quashed.

On the accused's behalf it was urged that at the trial he had expressed his willingness to maintain the child if she went to live with him. As the child's mother obtained a divorce from the accused under the law in force in Canada, and he must therefore have been adjudged to have been guilty of adultery, one would hesitate to express the opinion that such an offer made by the accused in this regard should be looked upon as sufficient to negative any liability on his part for the non-support of the child. In other words, I would hesitate to relieve the accused from liability, if such existed, merely because he was willing to support the child in a home in which the family atmosphere and environment might prove anything but beneficial and conducive to her moral welfare. However that may be, I prefer to rest my judgment upon the ground previously stated.

In my judgment the appeal should be allowed and the conviction quashed.

MULOCK, C.J.O., and HODGINS and MIDDLETON, JJ.A., agreed with GRANT, J.A.

MAGEE, J.A.:—The charge on which the accused was tried and convicted on the complaint of his former wife was that he unlawfully did refuse, neglect or omit on the 1st September, 1930, and other days before and after that date, to provide necessaries for Dorothy, his daughter under the age of 16 years, he being under legal duty to provide necessaries for her whereby she was in necessitous and destitute circumstances, such offence being contrary to subsec. 3 of sec. 242 of the Criminal Code.

The complainant swore that she had obtained a divorce in May, 1930 (see the Dominion Statutes of 1930, ch. 324, which recites that they were married in June, 1919). She had retained the custody of their child Dorothy, 8 years old, who continued to live with the mother. The mother had lived separately from the father for over two years. The father lived in the same city and had contributed nothing for the child's support since the divorce. The mother had supported herself and the child by working and was willing to maintain her as far as possible but said it was too much

strain on her, and she had now no money or anything to maintain her. She was not working the week of the trial. She had, at some previous time, "a while ago," brought an action against the father in a Division Court for the maintenance of the little girl. She sued in a personal capacity and as the next friend of the little girl; and that action was tried and dismissed, but it does not further appear what was the nature of the action or why it was dismissed, nor when it was brought. There was no evidence that the father had been informed of her being out of work or unable to continue to support or that he had been asked to contribute to or supply support or necessities or that he knew of any destitute or necessitous circumstances or that he had refused or expressed any intention of refusing to provide any necessities for the child.

There was thus no proof of any neglect, refusal or omission.

The accused on his part swore that he was willing to have the child come and live with him and to support her in his home. He was not asked and did not say that he had refused or would refuse to supply her with necessities while she was residing with her mother.

There are indications that not all the facts may be before the Court, but those presented on the evidence offered were not sufficient to support the conviction, and it should be quashed.

Appeal allowed.

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[APPELLATE DIVISION.]

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Criminal Law—Unlawful Assembly—Parade of Unemployed in City Streets—Police Commissioners' By-law—Restricted Area—Opposition of Police to Parade Passing through—Defiance of Police—Absence of Violence—Conviction of Leader as Member of Unlawful Assembly—Fear of Breach of Peace—Criminal Code, secs. 87-89.

A conviction of the defendant upon a charge of being a member of an unlawful assembly, contrary to sec. 89 of the Criminal Code, was affirmed (MAGEE and FISHER, J.J.A., dissenting).

The defendant led a parade of unemployed men through the streets of a city, the purpose being to demonstrate the extent of unemployment and to excite public sympathy. The chief constable forbade the defendant to lead the parade through a certain restricted area in the city, but the defendant refused to obey, and was arrested by the police; he then instructed his followers to enter the restricted area in defiance of the police, and they, pushing the police aside, carried the parade through the restricted area. No physical violence doing bodily harm resulted, apparently because the police realised the wisdom of yielding to a crowd of men who were unarmed and apparently harmless. Upon the trial of the defendant, a by-law of the police commissioners for the city regulating parades upon high-

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ways was put in, and there was discussion as to its meaning and effect and as to whether the police were acting in a manner authorised by the by-law:—

Held, that a breach of the by-law was not sufficient to establish the holding of an unlawful assembly, as defined by sec. 87 of the Code. But *held*, by the majority of the Court, that the defendant was a member of an assembly lawful in its inception, but unlawful in its execution, because it was determined to meet force by force and to resist the officers of the law. If the officers of the law were mistaken in their interpretation of the by-law or if the by-law was itself invalid, that did not justify the use of force against constituted authority, or even against any other, to the disturbance of the public peace.

Review of the English authorities.

Beatty v. Gillbanks (1882), 9 Q.B.D. 308, 15 Cox C.C. 138, doubted.

Wise v. Dunning, [1902] 1 K.B. 167, approved.

Per MAGEE and FISHER, J.J.A.:—Upon the evidence, there was no expectation of opposition to the parade unless from the police, who would not be supposed to break the peace, and there was in fact no other opposition. There was no fear of a breach of the peace, tumultuously or otherwise; and the conviction should be quashed.

AN appeal by the defendant from his conviction by THOMSON, Co. C.J., in the County Court Judge's Criminal Court for the County of Wentworth, of the offence of being a member of an unlawful assembly, contrary to sec. 89* of the Criminal Code.

November 26 and 27. The appeal was heard by MULOCK, C.J.O., MAGEE, MIDDLETON, FISHER, and GRANT, J.J.A.

J. B. Chambers, for the appellant, contended that he was not a member of an unlawful assembly. The "common purpose" which the members of the parade of unemployed persons intended to carry out was not unlawful. The fact that the police forbade the parade did not make it an unlawful assembly: *Rex v. Dewhurst*

* Sections 87, 88, and 89 of this Code are as follows:—

87. An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when assembled as to cause persons in the neighbourhood of such assembly to fear, on reasonable grounds, that the persons so assembled will disturb the peace tumultuously, or will by such assembly needlessly and without any reasonable occasion provoke other persons to disturb the peace tumultuously.

2. Persons lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in such a manner as would have made their assembling unlawful if they had assembled in that manner for that purpose.

3. An assembly of three or more persons for the purpose of protecting the house of any one of their number against persons threatening to break and enter such house in order to commit any indictable offence therein is not unlawful.

88. A riot is an unlawful assembly which has begun to disturb the peace tumultuously.

89. Every member of an unlawful assembly is guilty of an indictable offence and liable to one year's imprisonment.

(1820), 1 St. Tr. N.S. 529. There were no circumstances to cause persons in the neighbourhood to fear that the peace would be disturbed tumultuously. The hour was not dangerous, neither was any threatening language used by the members of the parade. The appellant shewed no intent to commit acts of violence. He did not resist the efforts of the police to place him under arrest. To make sec. 87 of the Code applicable, it must be shewn that three or more persons attempted to disturb the peace. In this case evidence has only been given against one person (the appellant).

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W. B. Common, for the Crown, argued that the members of the parade had a common intention to thwart the police in their efforts to prevent the parade from entering a certain restricted area. Assuming that this assembly was not unlawful at its inception, it became unlawful as soon as the men attempted to force their way into the restricted area despite the opposition of the police: *Regina v. Cunningham Graham* (1888), 16 Cox C.C. 420; *Regina v. McNaughten* (1881), 14 Cox C.C. 576. *Regina v. Clarkson* (1892), 17 Cox C.C. 483, is distinguishable on the ground that the members of the assembly did not have a common intention to resist the officers of the law in that case, whereas the members of the parade had such intention in the case at bar. Reference to Halsbury's Laws of England, vol. 9, pp. 469 and 470.

December 11. MIDDLETON, J.A.:—An appeal by the accused from his conviction on the 28th October, 1930, by his Honour Judge Thomson, sitting under the provisions of Part XVIII. of the Criminal Code, for that he, the said William Patterson, on the 16th day of October, 1930, at the city of Hamilton, was unlawfully a member of an unlawful assembly on the public streets of the city of Hamilton, contrary to the provisions of sec. 89 of the Criminal Code. Upon this conviction sentence was suspended on condition that he, the said William Patterson, keep the peace and be of good behaviour and refrain from addressing or inciting meetings of unemployed workers for the term of one year.

The circumstances giving rise to this prosecution and conviction are simple. There were many unemployed in the city of Hamilton. Among these Patterson assumed a position of leadership. It was desired by these unemployed men to parade along the main streets of Hamilton for the purpose of demonstrating the extent of unemployment prevailing and for the purpose of exciting public sympathy. It is not suggested that these men intended in the first place to break the law, or that there was any improper motive in the assembly and parade contemplated. There is in Hamilton a small central area which in the evidence has been called a

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restricted area, and it was thought that a parade could not be held in this restricted area without the sanction of the police. Patterson and others associated with him endeavoured to obtain the sanction of the police to the holding of this particular parade, but this was refused. On the day set for the parade the unemployed to the number of some 700 or 800 men assembled in the Hay Market-square and addresses were made. Patterson volunteered to lead a parade through the forbidden area if the others would follow him. He stated that arrests might be expected and that if arrests occurred he desired that he should be one of those arrested. The parade was held and was escorted by some police officers. When it reached the street intersection marking the restricted area, Patterson and the others with him leading the procession were requested not to enter the area, but to turn either to the north or to the south. This they refused to do. Patterson was arrested. Though there was some threat of an attempt to rescue him from the police, at his instigation the crowd desisted from this and followed his instructions and entered the restricted area in defiance of the police. According to the evidence of the police officers, there was considerable excitement and discussion, as might naturally be expected. Patterson's attitude was that, notwithstanding the police action, he and those associated with him "were going to go through," "to force his way through," and that he called to those in the parade, "All right boys, go ahead, go ahead, I am all right, go ahead," pointing up James-street. There was continual pushing ahead and shoving, and in the result Patterson and the crowd had their way, and, pushing the police aside, carried the parade through the restricted area.

The effect of this was to tie up the traffic in all directions at a busy intersection in the centre of the city. Those in the rear of the crowd, probably not realising what was going on in front, became excited, and, to use the language of one constable, "the crowd behind became quite unmanageable."

No physical violence doing bodily harm resulted, apparently because the police realised the wisdom of yielding to a crowd of men who were unarmed and apparently harmless. They did not themselves resist by force or violence. Had they done so, the result might have been far otherwise.

In the course of the hearing a by-law of the police commission was put in, and there was much discussion as to its meaning and effect and upon the question whether the police were acting in a way which was authorised by this by-law. In the view of his Honour, a breach of the by-law was not sufficient to establish the

holding of an unlawful assembly under sec. 87, and in this view, as will be seen, we agree.

Upon the argument the appeal was presented as though the question in issue was the propriety of the meeting and the motives of those assembled. This is not the real question before us. The statute was passed to secure orderly and peaceable conduct upon the streets, and to avoid tumultuous conduct of assembled crowds which might cause actual rioting, or which, in the opinion of persons of reasonable firmness and courage, might result in public disturbance. The object of those who assemble may be perfectly innocent, even highly commendable, yet, if the circumstances, in the mind of the ideal, calm, courageous, and reasonable man, are such as to lead him to fear that the public peace is in danger, it is the duty of those assembled to disperse.

Here no one suggests that these unemployed men intended any misconduct or uproar. They desired to impress the public with their need and to excite public sympathy, and so to obtain some relief in their distress. Yet, when it was plain that they would not be allowed to march through the restricted area of the city, by reason of the action of the police, they went too far when, as an assertion of their right to proceed with the parade, they undertook to force their way despite police opposition. That the accused knew that he was defying police authority and undertaking to assert his views as to his rights by force is very plain. He had announced at the meeting in the Hay Market his willingness to lead the throng, and stated there that, if there was opposition leading to arrest, as he thought was probable, he desired to be the one arrested.

No matter how worthy the cause or how clear the right to be asserted may be, our law requires the worthy cause to be advocated and the right to be asserted in a peaceable way, and not by riot and tumult. The provision of the Code prohibiting unlawful assemblies is for the purpose of drawing the line between a lawful meeting and an assembly, either unlawful in its inception, or which is deemed to have become unlawful either by reason of the action of those assembled, or by reason of the improper action of others having no sympathy with the objects of the meeting.

The law in this respect, like all our common law, has developed. There are to be found many early definitions and discussions not always possible to reconcile. These centre mainly on the point of view. On the one side, some sympathise with the actions of the peaceable and well-disposed seeking to forward a cause dear to them, and by them regarded as essential to the public weal. These, they think, ought not to be regarded as unlawful and be suppressed by reason only of the opposition of unruly men who without just

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cause seek to interfere and provoke disturbance merely because of their innate love of a row. This on the face of it looks like an easy way for evil to triumph over good under the protection of the law.

On the other side, there are those who take a wider, and, I think, a wiser view of the situation, and who regard the preservation of public peace as of paramount importance, and think that that which originated in good motives has become a public evil when there is the probability or the possibility of a tumult resulting.

We are saved from any necessity of discussing these conflicting considerations or attempting ourselves a solution, as Parliament has made the choice. The Criminal Code Commission, 1879 (England), after much consideration and investigation of the history of the common law and its growth by statute and by case law, recommended a codification of the law, which was not adopted in England, but which has been embodied in our Criminal Code.

It is worthy of note that the earliest cases upon this topic arose from the practice of the English gentry who were on bad terms with their neighbours going to market with bands of armed retainers for their protection. In doing this they were asserting what undoubtedly was their right. The Commissioners' comment is: "It is obvious that no civilised government could permit this practice, the consequence of which was at the time that the assembled bands would probably fight, and certainly make peaceable people fear that they would fight."

The Commission was well aware that the suggested statute went beyond the common law, for they say: "In declaring that an assembly may be unlawful if it causes persons in the neighbourhood to fear that it will needlessly and without reasonable occasion provoke others to disturb the peace tumultuously, we are declaring that which has not as yet been specifically decided in any particular case." Stephen's History of the Criminal Law, 1883, vol. 2, p. 385.

From very early times there has been no doubt upon the main question, for it is written in Hawkins' Pleas of the Crown, Bk. 1, ch. 28, sec. 7 (p. 516): "The law will not suffer persons to seek redress of their private grievances by dangerous disturbances of the public peace."

I purpose to review some of the more recent English cases to shew that even in England, where, as I have said, there is no such statutory provision as that found in our Criminal Code, the law does not differ in any material respect from this statutory provision.

In its early days the Salvation Army by its methods provoked opposition and gave rise to some difficult situations. Its pur-

poses were unquestionably benevolent, and its opponents were generally "certain base fellows," yet there undoubtedly followed clashes and tumult. *Beatty v. Gillbanks* (1882), 9 Q.B.D. 308, decided that the Army could not be properly convicted. As stated in the head-note: "The appellants assembled with others for a lawful purpose, and with no intention of carrying it out unlawfully, but with the knowledge that their assembly would be opposed, and with good reason to suppose that a breach of the peace would be committed by those who opposed it:—*Held*, . . . that they could not be rightly convicted of an unlawful assembly."

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If this case stood unchallenged, it would at first sight seem to go a long way to support the contention of the appellant, but a moment's reflection shews that there is a very wide distinction between the situation when a lawful assembly expects an attack from a rabble of irresponsible ruffians, and the situation in which those assembled themselves propose to provoke a conflict with the properly constituted guardians of public peace, the police. But this case has not been accepted as a satisfactory decision, and upon consideration of the reasons for judgment it will be found that it did not in reality determine the proposition for which it is cited. It is in truth a reaction from the situation which was regarded as intolerable. The Salvation Army had been convicted, while their organised opponents the "Skeleton Army" went free. The learned Judges who decided this case had no statute to guide them, and they chose a definition very different from that adopted by the Commission—"An assembly to be unlawful must be tumultuous and against the peace." The Salvation Army in its assembly was not "tumultuous and against the peace," and the Judges refused to extend the definition so as to make an assembly which was not itself armed or warlike unlawful merely because its presence might cause others to do that which would be unlawful. All this was said with this qualification (p. 314): "Every one must be taken to intend the natural consequences of his own acts, and it is clear . . . that if this disturbance of the peace was the natural consequence of acts of the appellants they would be liable . . . But the evidence . . . does not support this contention." Thus the case in reality turned upon the evidence.

In the same year was decided the Irish case of *O'Kelly v. Harvey* (1882), 15 Cox C.C. 435. This was dealt with by the Exchequer Division and by the Court of Appeal. Both these Courts are recognised as being unusually strong. The statement many years before made by Alderson, B., in *Regina v. Vincent* (1839), 9 C. & P. 91, 109, and so often quoted as to be rightly regarded as classic, is accepted as giving the true rule: "I take it to be the law

App. Div. of the land that any meeting assembled under such circumstances
 1930. as, according to the opinion of rational and firm men, are likely to
 REX produce dangers to the tranquillity and peace of the neighbourhood,
 v. is an unlawful assembly."

PATTERSON. Lord Chancellor Law said (pp. 445, 446): "Even assuming
 Middleton, that the danger to the public peace arose altogether from the
 J.A. threatened attack of another body upon the plaintiff and his
 friends, still, if the defendant believed and had just ground for
 believing that the peace could only be preserved by withdrawing
 the plaintiff and his friends from the attack with which they were
 threatened, it was I think the duty of the defendant to take that
 course." The action was for trespass against a peace officer who
 had taken the plaintiff in charge to prevent a breach of the peace by
 others whom his presence provoked. *Beatty v. Gillbanks* is re-
 ferred to as a case which cannot be understood as a decision upon
 the facts and very doubtful in law. "I have always understood the
 law to be that any needless assembly of persons in such numbers
 and manner and under such circumstances as are likely to provoke
 a breach of the peace, was itself unlawful" (p. 447).

In *Regina v. Clarkson* (1892), 17 Cox C.C. 483, the Court for
 Crown Cases Reserved quashed a conviction against members of the
 Salvation Army because there was no evidence that they came
 within the statement in Hawkins' P.C. that they did by their
 "assembly needlessly and without any reasonable occasion provoke
 other persons to disturb the peace tumultuously." This was ac-
 cepted as the test.

Much more important is the case of *Wise v. Dunning*, [1902]
 1 K.B. 167, which indicates that "a person who in addressing a
 public meeting in a public place, although he does not directly
 incite to the commission of breaches of the peace, uses language the
 natural consequence of which is that breaches of the peace will be
 committed by others," may be bound over to be of good behaviour.

In the argument the supposed conflict between *Beatty v. Gill-
 banks* and the opinion of the Irish Judges was referred to, and also
 the adverse criticism of the English decision by the well-known
 law writer Mr. Dicey. Lord Alverstone, C.J., is of opinion that
Beatty v. Gillbanks does not lay down any law which is in conflict
 with the views of the Irish Court, and turns altogether upon the
 facts. Lord Darling agrees, and adds: "If there be a conflict be-
 tween the two cases, I prefer the law as it is laid down in *Regina v.
 Justices of Londonderry* (1891), 28 L.R. Ir. 440.

In *Lansbury v. Riley*, [1914] 3 K.B. 229, the Court treats the
 whole question as finally settled by the decision in *Wise v. Dunning*,
supra.

I may say that the decision in *Beatty v. Gillbanks*, as reported in the Law Reports, was given by Field, J., speaking for the Court. In a contemporary report (15 Cox C.C. 138) the other Judge, Cave, J., gives a separate opinion in the course of which he says (p. 148): "If, though their meeting was in itself lawful, they intended, if opposed, to meet force by force, that would render their meeting an unlawful assembly,"

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The charge of Charles, J., in *Regina v. Cunninghame Graham*, 16 Cox C.C. 420, is a most valuable and accurate summary of the law. I refrain from quotation save this paragraph. After quoting from Hawkins' P.C., the learned Judge says (p. 428): "Now, mark what follows, and ask yourselves whether it is not admirable good sense: For the law will not suffer persons to seek redress for their wrongs by a dangerous disturbance of the peace. Gentlemen, I tell you that is the law of England, and I ask you does it not commend itself to your common sense? It is not a royal right, it is not an actual right which you are entitled to enforce by violence. The cases are very few indeed of that description, and I need not allude to them—cases, that is, in which by the strong hand you may assert your right. . . . You have no business to redress private grievances by a dangerous disturbance of the public peace."

Field v. Receiver of Metropolitan Police, [1907] 2 K.B. 853, is of importance because it contains a discussion of the phrase *terrorem populi*, essential in an indictment for riot; but more important and more to the point is the decision in *Lansbury v. Riley*, *supra*, that to justify binding over to keep the peace it is not necessary to shew that any one was "put in bodily fear."

This power to bind over to keep the peace is described in the *Lansbury* case, [1914] 3 K.B. at p. 237, by Avory, J., quoting Fitzgerald, J., in *Regina v. Justices of Queen's County* (1882), 10 L.R. Ir. 294, at p. 301, as "a branch of preventive justice, in the exercise of which magistrates are invested with large judicial discretionary powers for the maintenance of order and the preservation of the public peace. Whether it existed at common law, or flows from the commission, or has been conferred by statute, it rests on the maxim or principle '*salus populi suprema lex*,' in pursuance of which it sometimes happens that individual liberty may be sacrificed or abridged for the public good."

I would add a quotation from the same learned Judge in *Regina v. McNaughten*, 14 Cox C.C. 576. "If persons assemble to obstruct the officers of the law, all parties so assembling are guilty of an unlawful assembly whether a riot takes place or not."

All this satisfies me that the accused was a member of an assembly lawful in its inception, but unlawful in its execution.

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because it was determined to meet force by force and to resist the officers of the law. It is quite immaterial that the officers of the law may have been mistaken in their interpretation of the police regulation, or that the regulation itself may be invalid. This does not justify the use of force against constituted authority, or even against any other, to the disturbance of public peace.

The conviction must be affirmed. I would commend the learned County Court Judge for his good sense and moderation in dealing with this case.

McLOCK, C.J.O., and GRANT, J.A., agreed with MIDDLETON, J.A.

MAGEE, J.A.:—The appellant has been convicted on a charge of a specific offence, that is, being on the 10th October, 1930, a member of an unlawful assembly on a public street, contrary to a specified enactment, sec. 89 of the Criminal Code.

Section 87, defining an unlawful assembly, was carefully drawn and we are confined to its provisions. Under it, to be an unlawful assembly there need not be an unlawful purpose, but there must be an intent to carry out a common purpose and the members must so assemble or so conduct themselves when assembled as to cause persons in the neighbourhood to fear on reasonable grounds that those assembled will disturb the peace tumultuously or will by their assembly needlessly and without any reasonable occasion provoke others to disturb the peace, and the section is careful to provide that though lawfully assembled they may become an unlawful assembly if they conduct themselves with a common purpose in such a manner as would have made their assembling unlawful if they had assembled in that manner for that purpose.

Such being the law, we are confined to the evidence before the Court. A police officer states that there was a meeting on the Hay Market in Hamilton of the Hamilton Workers' Council, which he says is a society of the unemployed. The appellant was chairman, and he informed the meeting that he had asked permission of the chief of police for a parade, which had been denied. The appellant then said: "Now, if you boys want to have this parade, we will have it. Most likely there will be some arrests made, and if so I want to be the man who is arrested;" and he offered to lead them, and the crowd more or less gave the impression that they wanted to parade. The parade, numbering between 700 and 800 persons, was formed and proceeded up Hughson-street, and at Main-street a police inspector called the appellant off to one side and told him that he was making a blunder, that he had no permission from the

chief of police and that the chief had directed the inspector to direct him to keep out of the restricted area, bounded by four streets which he named. The inspector said: "If you conform to that there will be no interference. If you do not it is going to cause trouble;" and the inspector recalled to him his words at the Hay Market already referred to. The inspector added: "We don't want to arrest you. We want you to conform to what we request of you. If you comply with the route I have mentioned no interference will ensue." The appellant said he wasn't altogether familiar with the streets, and the inspector said: "That being the case, I will detail an escort to lead you along the road. If you follow you will make no mistake." The inspector says that that conversation took place within the so-called restricted area.

The parade proceeded quietly, guided by three police officers, along various streets to James-street and along James-street, which would take it past the city-hall. At Cannon-street the officers told the appellant, who was leading the parade, that he would have to turn to the right or left, east or west. The policeman examined says that turning there was necessary because, if the appellant continued on James-street, he would be entering the restricted area. The appellant refused to abide by the police officer's order. He said he was the leader, and he was going to go through, that is what his orders were and he was going to carry them out. The officer says he himself judged therefrom that the appellant was going to force his way through. The officers talked with him for some time, trying to shew him where he was wrong, but he refused absolutely to abide by their orders. In the meantime, the officer says, traffic was being tied up all four ways at the intersection, a busy one. "The crowd behind became quite unmanageable and we took hold of Patterson and took him over to the side of the road and he was placed under arrest. The parade continued on up James-street." It later passed the city-hall. While the police were holding the appellant on the sidewalk he said, "All right, boys, go ahead, go ahead." The officer says: "There were several tried to assist him, to get him away from us. He just continued to say 'Go ahead, boys, I'm all right, go ahead,' pointing up James-street south" The officer admits that when those others were trying to get him away from the officer the appellant told them to stop, but, the officer adds, "in a half-hearted way." He said, "I'm all right, go ahead." It was between 5 and 10 minutes before the officers got the traffic clear. "There were no remarks made by his pals at all. It was quite exciting around there. There was no violence used." All this was between 11 and 12 o'clock in the forenoon.

Though objected to by the appellant's counsel, the prosecution

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put in a copy of a by-law No. 71, passed on the 18th June, 1930, by the police commissioners of the city "for regulating parades or processions on highways and preventing the obstruction thereof during processions or public demonstrations." The first clause provides: "No procession or parade will be allowed upon a highway unless at least 24 hours' notice in writing of the intention to hold the same is given to the chief constable," stating the place of assembly and hour of starting and proposed route and destination and approximate number on foot and mounted, and carriages and bands. By clause 5, notice need not be given of a procession of less than 50 persons. By clause 2, a procession is to march so as not to obstruct street-cars and on the right hand side of the streets. By clause 3, it is to cause no unnecessary interruption to street-car or other traffic, and shall obey the directions of the police officers as to allowing street-cars or other traffic to pass through. By clause 6, the chief constable may, if he deem it expedient and necessary, require the procession to take a different route from that indicated in the notice, and the procession shall adhere to the route approved by the chief constable. By clause 7, at the intersections or other frequented portions of the highway, on all occasions or times when the highways may be thronged or liable to obstruction, police constables are authorised and directed to order all traffic to cease in one direction for a sufficient time to allow traffic in the other direction to proceed, and may generally direct the traffic (except street-cars) at such places, with a view to keeping order and preventing collisions of traffic, and persons in charge of street-cars or other vehicles and other persons upon the highway shall obey the orders and directions of the police constables "given in accordance herewith." By clause 4, persons on the highway are to obey the directions of the police as to stopping or passing through the procession. By the last clause, 8, any person convicted of a breach of any of these regulations shall forfeit and pay a penalty not exceeding, exclusive of costs, \$50 for each offence.

The copy of the by-law, thus admitted in evidence against objection, is certified only by the city clerk and not by a member of the board even, as authorised by sec. 361 of the Municipal Act, and the copy is no evidence. Under the Evidence Act either of the Dominion or the Province, the city clerk is not as such and is not shewn to be the custodian or the clerk of the board.

The prosecution, whether purposely or not, did not offer any proof of the restricted area, nor how or by whom it was restricted or what were the restrictions. Nothing further was shewn by the prosecution.

One witness was called for the defence, who had accompanied

the appellant on the previous day to see the chief of police for permission to have a parade. His evidence is: "Patterson asked the chief of police could we hold a parade. The chief said, 'No, there is going to be no parade at all.' Patterson asked, 'Is that final?' He said, 'Yes, that is final, and if the parade is going to come off you, Mr. Patterson, will suffer for it.'" That was all that happened. The witness on cross-examination said he was on the executive of the association, and it was "for employed and unemployed men but of course there is more unemployed than employed in it," and its object was to get work—to form an association among the working class. "We are trying to get relief or work if we possibly can, just to tide over the present unhappy condition." Being asked how did Patterson happen to be leading the procession, he says: "We asked him would he lead the procession, and he said 'Yes;' the executive put him up to lead; there is no president, just a secretary. We were parading just to shew the public of the city what we are or how many were unemployed," and they want to go through the city on the main parts or the business parts.

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The chief of police was not called, and this witness is not contradicted, and the police magistrate does not hint that he disbelieves him. On his evidence it would seem that the chief constable acted in a very unreasonable manner. On the other hand, the officers on duty acted with judgment and moderation on what they supposed their duty. There is no evidence that the chief constable directed any particular route for the procession.

So far as the evidence before the Court goes, the men were entitled, like other citizens, to go along any street so long as they conducted themselves properly. From beginning to end there is no hint that they did not obey the ordinary traffic regulations or that there was any difficulty or undue interference with others or by others with them. They excited no hostile feelings. They gave no evidence of intention even to resist the police. They expected arrests, but there is no indication that they intended to do otherwise than submit to arrest, as the appellant in fact did, and as others do, to test the legality of the acts of persons assuming authority. The police officer says there was no violence. Section 87 of the Code is aimed at disturbance of the peace tumultuously or provoking it. Here nothing of the sort was intended or occurred. There was not even disturbance of traffic, except that caused for a few minutes by the police themselves unwisely stopping the procession at the intersection. It is true that acts of violence are not necessary if the circumstances are calculated to alarm reasonable people: *Regina v. Cunningham & Graham*, 16 Cox C.C. 420; *Regina v. Vincent*, 9 C. & P. 91.

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In *Beatty v. Gillbanks*, 9 Q.B.D. 308, it was held that where the appellants, members of the Salvation Army, assembled with others for a lawful purpose, and with no intention of carrying it out unlawfully, but with knowledge that they would be opposed and with good reason to suppose that a breach of the peace would be committed by those who opposed it, they could not rightly be convicted of unlawful assembly. Here there was no expectation of opposition unless from the police, who would not be supposed to break the peace, and there was no other opposition. There was no fear of a breach of the peace tumultuously or otherwise.

The Municipal Act, R.S.O. 1927, ch. 233, in sec. 43(1), enables the Police Commission to pass by-laws regulating parades or processions and prescribing routes of all persons on the highway and directing the police as to keeping order and preventing obstruction, and in secs. 366 and 367 places the police under the direction and government of the Police Commission and in sec. 372 charges the police with the preservation of the peace and preventing robberies, and other crimes and offences, including offences against the by-laws of the municipality, and of apprehending offenders, and laying informations against and prosecuting them; and formerly a section, 369 of the 1914 Act, gave powers to arrest without warrant in special circumstances not here in question. But ordinarily there is no power to arrest without warrant for breach of a municipal by-law: *Kelly v. Barton* (1895), 26 O.R. 608, affirmed in 22 A.R. 522.

The Criminal Code in secs. 646, 647, and 649 authorises arrest without warrant for breach of many sections, including secs. 85, 86, and 92, but not sec. 87 or 89, and in cases of escape and fresh pursuit, which did not here exist, while sec. 648 only authorises it when a person is found committing a criminal offence.

This appellant, leading a peaceable procession, and said but not proved to have been acting in breach of some by-law, is arrested and, instead of being charged with breach of the by-law, for which he might be fined, is charged with a crime for which he might be imprisoned. The hands of our peace officers endeavouring to enforce the laws should be upheld and strengthened, but I am unable to convince myself that on the evidence here presented this conviction should stand, and therefore I would allow the appeal.

FISHER, J.A.:—I fully agree with the conclusion of my brother Magee that this appeal should be allowed, and I desire to add that the Crown has utterly failed to produce—as it was bound to—any witness proving that persons in the neighbourhood had reasonable grounds to fear that the peace would be disturbed tumultuously, or to provoke other persons to disturb the peace tumultuously.

Appeal dismissed (MAGEE and FISHER, J.J.A., dissenting).

[APPELLATE DIVISION.]

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Dec. 11.

Promissory Note—Consideration—Forbearance to Sue for Debt—Evidence—Bills of Exchange Act, R.S.C. 1927, ch. 16, sec. 53—Appeal from Decision of Trial Judge—Duty of Appellate Court.

The defendants, husband and wife, were respectively vice-president and president of a company which was indebted to the plaintiff company and was unable to make payment. The defendants made a joint and several promissory note in favour of the plaintiff company, payable on demand, for the amount of the debtor-company's indebtedness. This was done at the solicitation of K., a representative of the plaintiff company, who said that he would not sue "them" so long as they shewed a disposition to pay:—

Held, upon the evidence, that by "them" K. meant the debtor-company; that forbearance to sue upon the demand note was a sufficient consideration for the giving of it; and that the wife-defendant was liable upon it.

Upon the hearing of an appeal from the decision of a trial Judge sitting without a jury, where there is no conflict of testimony, the appellate court has not to consider whether there is any evidence on which the verdict could be reasonably based; it has to consider whether it, on the evidence, would have come to the same conclusion. *Wilson v. Kinnear*, [1925] 2 D.L.R. 641, and *Mersey Docks and Harbour Board v. Procter*, [1923] A.C. 253, followed.

AN action upon a joint and several promissory note made by the two defendants, who are husband and wife, in favour of the plaintiff company, payable on demand.

Judgment was signed against the defendant Robert C. Rubel by default. The trial of the action as against the defendant Annetta Jane Rubel was referred by GARROW, J., to the Judge of the County Court of the County of Welland, under sec. 67 of the Judicature Act.

The County Court Judge made his report that judgment should be entered for the defendant Annetta J. Rubel dismissing the action as against her with costs. From that report the plaintiff company appealed.

April 17. The appeal was heard by ORDE, J.A., in the Weekly Court, Toronto.

Allan Brooks, for the plaintiff.

H. S. Honsberger, for the defendant Annetta J. Rubel.

June 9. ORDE, J.A.:—The only evidence is that of Keenan, the manager of the plaintiff company, and Mrs. Rubel's examination for discovery. The learned County Court Judge held, upon the evidence, that there was no consideration for the note.

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The plaintiff company had supplied the Welland County Motors Ltd. with gasoline and oil on credit, and on or about the 27th November, 1929, the Welland company was indebted to the plaintiff company in the sum of \$5,206.62. Both defendants were then directors of the Welland company, Mrs. Rubel being the president and her husband the vice-president.

In consequence of pressure brought to bear upon the Welland company by the plaintiff, the two defendants, Rubel and his wife, gave to the plaintiff company their joint and several promissory note for \$5,206.62 with interest at 7 per cent. per annum, payable to the plaintiff company on demand.

The learned County Judge says: "It is open to the defendant to shew whether there was any consideration. In this case I am unable to see any. The note was prepared by Keenan, apparently in his own office, and taken to the office of the Welland County Motors. He then and there demanded a settlement of the plaintiff company's claim, and as a consequence of this demand this note was signed. He promised nothing that any one could take hold of; nothing that I can see. It was signed by reason of his pressure, and not by reason of any request for forbearance. In my opinion, there was no consideration."

Upon Keenan's cross-examination by the defendant's counsel, an effort was made to extract from him an admission that he had not promised the Welland company any extension of time for payment, and upon his examination for discovery, which was used as a foundation for part of his cross-examination, he answered "No" to the question, "Did you make any promise you would not take any action against Welland County Motors Ltd.?" And counsel tried to get him to admit that any promise to forbear had reference to his claim upon the demand note itself, to which the Welland company was not a party.

I do not think it is a fair reading of Keenan's evidence to conclude that when the note was given and he promised to forbear, the promise had no reference to the Welland company's liability. In the very nature of things, the defendants would hardly have signed a note, and a demand note at that, if the company was to be sued immediately. Keenan speaks of "them" and "they" in a comprehensive way, and clearly means by those words, not only the Rubels but their company as well. He says distinctly at one place: "I said I wouldn't sue them as long as they shewed a disposition to pay. Q. You wouldn't sue Rubel? A. I wouldn't sue the County Motors." Later his cross-examination proceeds:—

"Q. Tell me what definite promise did you make to Mrs. Rubel when she signed that note? A. I said I wouldn't do anything.

She said: 'This demand note means you have to pay right away;' and I said: 'Yes, but you need not pay me as long as the County Motors is reducing the account; I will give you a reasonable time.'

"Q. Give the County Motors a reasonable time before you would sue them; did you say that? A. don't know if I used the word 'sue;' I said I would give a reasonable time; I would wait."

Mrs. Rubel's examination for discovery does not shake Keenan's evidence. She admits that the note was given because she was anxious that the Welland company should be able to carry on, if possible.

There can be no doubt that the demand note was given to secure the company's debt and in the belief that an extension of time would help it out of its difficulties. The plaintiff did in fact forbear and took no action against the company up to the date when it went into bankruptcy, in the following January.

The evidence, in my judgment, sufficiently establishes that the note was given for the express purpose of gaining time for the Welland company, and that the plaintiff company's manager did promise to forbear. That being my view, it is not necessary to discuss the cases referred to on the argument.

Section 53 of the Bills of Exchange Act, R.S.C. 1927, ch. 16, was referred to. By that section, an antecedent debt or liability may constitute valuable consideration for a bill or note, even if payable on demand. Whether or not that enactment is sufficient to make an antecedent debt of A. a valuable consideration for a demand note given to the creditor by B., as security merely and not by way of novation, may be a nice question which I am not driven to determine.

The conclusion of the learned County Court Judge must be set aside, and judgment entered for the plaintiff against the defendant Annetta Jane Rubel for the sum of \$5,206.62, with interest at 7 per cent. to the date of the writ, and at 5 per cent. upon the aggregate amount then due from that date to the date of this judgment (the whole to be calculated by the Registrar and judgment entered for the one sum) and the costs of this action, including the costs before the County Court Judge and of this motion.

The defendant Annetta Jane Rubel appealed from the judgment of ORDE, J.A.

November 25. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

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R. B. Law, for the appellant, contended that a promissory note is a contract, and when no consideration has actually passed there must be mutual promises, which are enforceable. No promise was made by the respondent company to the appellant which could have been enforced in a court of law. Forbearance exercised towards a third party is a good and valid consideration for the giving of a promissory note between two other persons. No such promise of forbearance was given by the respondent company. Reference to *Stack v. Dowd* (1907), 15 O.L.R. 331; *Bytes on Bills*, 18th ed., p. 127; *Croft v. Beale* (1851), 11 C.B. 172, at p. 174; *Nelson v. Serle* (1839), 4 M. & W. 795; *Abrey v. Crux* (1869), L.R. 5 C.P. 37. The respondent company was not requested by the appellant to extend the time for payment of the note.

Allan Brooks, for the plaintiff company, respondent. An actual forbearance is sufficient consideration for the giving of a promissory note: *Crears v. Hunter* (1887), 19 Q.B.B. 341; *Fullerton v. Provincial Bank of Ireland*, [1903] A.C. 309, at p. 315; *Creelman v. Stewart* (1895), 28 N.S.R. 185; *Falconbridge on Banking and Bills of Exchange*, 4th ed., p. 606; *Chitty on Contracts*, 18th ed., p. 25; 8 *Corpus Juris*, p. 214; *Wynne v. Hughes* (1873), 21 W.R. 628. *Stack v. Dowd*, *supra*, distinguished on the ground that no mention was made of an extension of time or forbearance in that case, whereas there has been an actual forbearance in the case at bar. An inference as to forbearance can be drawn from the facts.

December 11. The judgment of the Court was read by GRANT, J.A.:—This was an action brought by the plaintiff company against Robert C. Rubel and Annetta Jane Rubel, his wife, upon a promissory note dated the 17th November, 1929, payable to the plaintiffs upon demand, for the sum of \$5,206.62, the amount of an indebtedness owing by Welland County Motors Limited to the plaintiff company for gas and other similar commodities bought and sold.

The action was referred by Garrow, J., for hearing by the County Court Judge at Welland, by whom judgment was given dismissing the action as against the female defendant, no defence having been entered by her husband. No evidence was given by or on behalf of the defendants at the hearing before the County Court Judge, who delivered his judgment on motion for a non-suit in favour of the female defendant. It may be noted in passing, therefore, that there was no conflict of testimony and therefore no finding based upon such a foundation.

The duty of an appellate court upon the hearing of an appeal from the decision of a trial Judge, sitting without a jury, was stated by Lord Dunedin in delivering the judgment of the Judicial Committee in *Wilson v. Kinnear*, [1925] 2 D.L.R. 641, at the top of p. 646, in the following words:—

“A Court of Appeal has not to consider whether there is any evidence on which the verdict could be reasonably based; it has to consider whether it, on the evidence, would have come to the same conclusion.”

To the same effect was the statement of Viscount Cave, L.C., in *Mersey Docks and Harbour Board v. Procter*, [1923] A.C. 253, at pp. 258 and 259, where he states:—

“In such a case it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly.”

On an appeal by the plaintiffs, Orde, J.A., reversed the decision of the County Court Judge, and directed judgment to be entered against the female defendant for the amount of the promissory note with costs. From that decision the defendant Annetta Jane Rubel now appeals.

The principal ground of appeal as presented to us was that there was no consideration for the giving of the promissory note by this defendant, and that the decision of the County Court Judge—to whom the action was referred for trial—was right and should not have been set aside.

This defendant was president, and her husband vice-president, of Welland County Motors, which was indebted to the plaintiff company in a sum exceeding \$5,000, and was unable to make payment.

Welland County Motors was having some difficulty in continuing in business, and this defendant was anxious to obtain for the company as much time as possible in respect of its indebtedness to the plaintiff company, which was one of the largest creditors.

A cheque had been given to the plaintiff company for \$1,350 on account shortly before the promissory note in question was signed, but that cheque had been returned “not sufficient funds.” Keenan, the local representative of the plaintiff company, went to see this defendant and her husband at the Motors company’s offices and insisted on the matter being straightened out in some manner, suggesting that the two defendants should give their personal note for the amount of the indebtedness. It may be noted in

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passing that, as appears from her examination for discovery—a portion of which was put in as part of the plaintiff company's case—she was a business woman, had managed a grocery business, was more or less familiar with promissory notes and their effect and the obligations thereby incurred, and when asked with reference thereto stated that she understood that when a note was payable on demand that meant it was payable immediately. It also appears from her examination that she and her husband identified themselves with Welland County Motors and that they personally and the last named company were spoken of as “we” and otherwise in the like manner. For example, in her examination for discovery (question 86, appeal-book, p. 16):—

“Q. 86: You owed the City Service a good many thousands of dollars, did you not? A. Yes.”

The indebtedness was not owing by her or by her husband prior to the making of the note in question, but was the indebtedness of the Motors company. I think this is of some consequence when we come to consider the evidence given by Keenan regarding the conversation which took place between himself and the defendants on the occasion on which the promissory note was signed. In his evidence before the Referee (appeal-book, p. 11), when he was asked the question, “Will you tell me what was said between you and Mrs. Rubel when she signed the note?” he replied: “Mr. Rubel signed the note and passed it to Mrs. Rubel, and she said, ‘We could not pay that amount right away,’ ‘and I said, ‘You do not need to pay it right away as long as you shew signs of paying it in a reasonable time; as long as you shew a disposition to pay and reduce it in a reasonable time, payment in a week or ten days.’” To the question, “Was nothing more said?” he replied: “A. She said, ‘A demand note means payment at once?’ and I said, ‘Yes, it does, and I could close the County Motors right away, but I will not as long as you shew a disposition to pay.’” Then, again, at the bottom of the same page, the question was asked: “Did you make any promise to Rubel that you would not sue the Welland Motors? A. I said I would not sue them as long as they shewed a disposition to pay. Q. You would not sue Rubel? A. I would not sue the County Motors.” Keenan was then confronted with answers which he had made to questions upon his examination for discovery, which appeared to be at variance with the answers given on the reference before the County Court Judge. On discovery he had stated that his promise not to sue was in reference to the Rubels' liability and not with reference to the County Motors' liability.

Upon a careful perusal and consideration of the whole evidence, I am satisfied that Keenan was identifying the defendants with the company of which they were in control and of which they were the principal executive officers, as is quite commonly done by ordinary business men in dealing with a limited company.

If the evidence were to be accepted as shewing a promise or agreement not to sue on the promissory note then being given by the defendants personally, such evidence would not be admissible, nor would such a promise be given any effect by the Court. The reason for this is obvious, as it would be in direct conflict with the express language of the written document. The law upon the point was fully set forth in the old case of *Abrey v. Cruix*, L.R. 5 C.P. 37, which has been followed in numerous cases both in England and in this Province. The rule in this regard is stated, in the 18th edition of Chitty on Contracts (1930), p. 124, where a number of cases are referred to, to be still in full force and effect.

Evidence of a promise to shew forbearance toward the Motors company in respect of its liability would, on the other hand, be quite admissible. So, also, a promise to shew forbearance toward that company would constitute a good and valuable consideration for the promissory note given by the individuals. It is well-settled "that an agreement to forbear either absolutely or for a certain time, or for a reasonable time, to institute or prosecute legal or equitable proceedings to enforce a legal or equitable demand, is a sufficient consideration for the promise of the debtor, "or of a third person, to pay the debt or do any other act:" Chitty on Contracts, 18th ed. (1930), p. 25, where the cases are cited. Such a consideration is sufficient in law as moving from the payee of the note to satisfy the conditions in that regard set forth in *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge and Co. Ltd.*, [1915] A.C. 847. It is also to be noted that an express or definite promise of forbearance is not essential to the validity of such a contract. It is sufficient if the circumstances are such as that the terms of forbearance may be implied: *Crears v. Hunter*, 19 Q.B.D. 341, which is also cited in Chitty at p. 27.

As already stated, the note sued upon was given on the 17th November, and no action appears to have been taken against the Motor company for 6 weeks or so. There was therefore an actual forbearance shewn.

Upon the authorities, therefore, I agree with the view expressed by Orde, J.A., from whom this appeal is taken, that there was a good and valid consideration for the giving of the promissory note by this defendant, and in this respect I think the learned Referee was in error. Following, therefore, the course stated

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(*supra*) as proper to be followed by an appellate court under the circumstances, this appeal should be dismissed with costs, and the judgment entered in accordance with the direction given by Orde, J.A.

Appeal dismissed.

[IN CHAMBERS.]

RE BAECHLER.

1931.

Surrogate Courts—Jurisdiction of Judge upon Audit of Executors' Accounts—Determination of Question of Ownership of Mortgages Taken jointly in Names of Testator and another—Whether Assets of Estate—Surrogate Courts Act, R.S.O. 1927, ch. 94, sec. 65(3)—Prohibition—Refusal of Application for—Remedy by Appeal.

Jan. 5.

Upon an audit of the accounts of the executors of B., deceased, the Judge of a Surrogate Court took evidence with a view to determining a question as to the ownership of certain mortgages each of which had been taken jointly in the names of the deceased and another person. These mortgages, according to the contention of the respondents, should be regarded as assets of the estate and accountable for by the executors, while the surviving mortgagee in each case contended that he was entitled as survivor to the security and the fund represented by it. After evidence had been taken at great length before the Surrogate Court Judge, three of the executors took the objection that the Judge was without jurisdiction. The Judge ruled that he had jurisdiction, and the objecting executors then applied for prohibition:—

Held, that sec. 65(3) of the Surrogate Courts Act applied to the situation, and that the Judge had jurisdiction to make the proposed inquiry.

In re MacIntyre (1906), 11 O.L.R. 136, followed.

Re Graham (1911), 25 O.L.R. 5, *Re Russell* (1904), 8 O.L.R. 481, *Shaw v. Tackaberry* (1913), 29 O.L.R. 490, and *Re Reid* (1921), 50 O.L.R. 595, referred to.

Even if the Judge had not jurisdiction, an order for prohibition should not be made; for a lengthy investigation had taken place without objection until the evidence was all in and the matter ready for argument; and, if the Judge was wrong in assuming jurisdiction, an appeal lay from any order he might make—prohibition is not *ex debito justitiæ*.

AN application by three of the executors of Charles Baechler, deceased, for an order prohibiting the Judge of the Surrogate Court of the County of Bruce and three other persons interested in the estate of the deceased, who filed a notice of surcharge, from taking any other proceedings, upon the audit of the executors' accounts pending before that Judge, to determine the question of the ownership of certain mortgages taken jointly in the names of the deceased and another.

December 16, 1930. The application was heard by GARROW, J., in Chambers.

G. W. Mason, K.C., for the applicants.

Campbell Grant, for the respondents.

January 5, 1931. GARROW, J.:—The mortgages were taken in the names of the deceased and another (a different individual in each case but in all cases a relative, as well as, under the will, an executor), and they, according to the contention of the respon-

Garrow, J. 1931. RE BAECHLER. dents, should be regarded as assets of the estate and accountable for by the executors—while the surviving mortgagee, in each case in question, contends that he or she is entitled as survivor to the security and the fund which it represents. It appears that, at the present time, it is only the question of the interest on these mortgages that is before the Judge; but to determine who is entitled to the interest necessarily requires a determination of the ownership of the funds themselves.

It is unnecessary and would be improper for me to consider the merits of the question. The surviving mortgagees of course rely upon such authorities as *Standing v. Bowring* (1885), 31 Ch. D. 282, *Re Reid* (1921), 50 O.L.R. 595, and the like. It is sufficient for the present motion to say that there is a real question to try and that a large amount is involved, several of the mortgages being for large amounts and none of them being for less than \$1,000.

The audit of the accounts has been proceeding for some time, and evidence upon the question involved here, as well, no doubt, as upon other matters, has been taken at great length before the learned Judge. The executors were originally represented by the late Mr. R. Vanstone, K.C., of Wingham, and the surcharge which raised the question was filed by the respondents while he was acting. He raised no objection to the matter being considered and disposed of by the Judge, and the evidence was concluded and the matter was standing for argument at the time of Mr. Vanstone's death.

When the matter was next proceeded with, the present solicitors attended and for the first time took the objection that the Judge was without jurisdiction. The learned Judge ruled that he had jurisdiction, and the matter was then adjourned to permit this motion to be brought.

Counsel for the applicants referred to the amendment passed in 1927 to the Surrogate Courts Act, which amendment is now to be found in sec. 63 of R.S.O. 1927, ch. 94, and he points to the limitation of \$800 referred to therein as indicating the extent of the Judge's jurisdiction. But, in my view, that section does not apply. Here no claim to ownership of any personal property is made by the personal representatives. They are in fact disclaiming ownership, and the respondents are seeking to charge them with the securities in question.

That section was enacted by reason of the difficulty created by the decision in the case of *Re Graham* (1911), 25 O.L.R. 5, in which it was held that sec. 69 (now sec. 62) of the statute, dealing with the contestation of claims against an estate, did not confer

power upon the Surrogate Court Judge to adjudicate upon a claim to moneys of a deceased person under an alleged *donatio mortis causâ*, the claim or demand referred to in the section being the claim of a creditor.

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The section, I think, which has chiefly to be considered is 65(3), dealing with the power of the Judge on passing executors' accounts. In *Re Russell* (1904), 8 O.L.R. 481, decided before subsec. 3 was enacted, it was held that the Surrogate Court had no jurisdiction, upon the passing of accounts by an executrix, to inquire into the validity or otherwise of an alleged gift of \$500 to the widow, who was also the executrix, and with which she was sought to be charged.

As a result of this decision, subsec. 3 was enacted, which reads as follows:—

“(3) The Judge, on passing the accounts of an executor, administrator or such a trustee, shall have jurisdiction to enter into and make full inquiry and accounting of and concerning the whole property which the deceased was possessed of or entitled to, and the administration and disbursement thereof in as full and ample a manner as may be done in the Master's office under an administration order, and, for such purpose, may take evidence and decide all disputed matters arising in such accounting subject to appeal.”

It is this section, I think, which applies to the present situation.

Shortly after its enactment, the question of its scope came up for consideration in the case of *In re MacIntyre* (1906), 11 O.L.R. 136. It was there held that its language was not wide enough to include jurisdiction on the part of the Surrogate Court Judge to call upon a creditor of the estate to prove his claim and to allow or bar it, the amendment, although couched in very broad language, being nevertheless only an amendment of the general section dealing with the auditing of executors' accounts. But the Court did hold in that case that the object and effect of the amendment was to enable the Judge to enter into any question which it was necessary for him to deal with in order to determine how much the personal representative had received or ought to have received and to be charged with and to credit him with what he properly had paid so as to ascertain the balance with which he was chargeable.

In *Shaw v. Tackaberry* (1913), 29 O.L.R. 490, it was held that a Surrogate Court Judge had power under the statute as amended to inquire into the propriety of a payment by the defendant as executor to himself, that there was no difference between a retainer by the executor in favour of himself and a payment to

Garrow, J. another creditor, and, the matter having been investigated and
1931. allowed in the taking of the defendant's accounts as executor, and
no appeal having been taken from the order made in passing the
RE accounts, the plaintiff could not now in this action have the matter
BAECHLER. re-opened, but she was given leave to appeal from the order of the
Surrogate Court.

In *Re Reid*, 50 O.L.R. 595, Latchford, J. (now C.J.), sitting in Weekly Court, on appeal from a Surrogate Court Judge who had made an order on passing executors' accounts, charging the executors with sums of money which came to their hands before the death of the testator, and which they alleged to be gifts, held in his first memorandum that the Surrogate Court had no power to deal with the question, and he suggested the bringing of an action. Later, on being advised that no action would be brought, he allowed the appeal, holding that "the gifts made by the deceased to his father . . . —however improvident they may have been—are not chargeable against the executors." On appeal to the Appellate Division this judgment was sustained on the merits, the question of jurisdiction not being discussed by any members of the Court except by Hodgins, J.A., who dissented and held that the gift was not established. He also held that, by virtue of the amendment already referred to, the jurisdiction conferred upon the Surrogate Court Judge was sufficiently broad to include an inquiry as to the validity of the gifts in question. He points out that since *Re Russell*, *supra*, the statute has been amended and holds that, since the Judge now has the same jurisdiction as the Master under an administration order, it was therefore competent for him to make the inquiry. He does not apparently refer to the case mentioned above, *In re MacIntyre*.

This decision, therefore, so far as the majority of the Court is concerned, does not in terms either affirm or deny jurisdiction in the Surrogate Court Judge to deal with the matter, a jurisdiction which Latchford, J., held did not exist. One would infer from the fact that the merits were so fully gone into that the majority of the Court would agree with Hodgins, J.A., in holding that jurisdiction did exist.

The conclusion, however, at which I have arrived is based upon the decision in *In re MacIntyre*, and I am inclined to the view that if, as was there held, the Surrogate Court Judge is empowered to enter into any question which it is necessary for him to deal with in order to determine how much the personal representatives had received or ought to have received and to be charged with, then he had power to investigate the matters in question here. I agree

that it would be much better and more satisfactory if an action or actions were brought. In what manner the ultimate rights of all the parties involved are going to be effectively worked out in these proceedings I do not know. But I am not prepared to hold that on the passing of the accounts the Surrogate Court Judge is exceeding his jurisdiction in making the proposed inquiry.

Were I of a different opinion, I should still, I think, decline to make the order asked for. Prohibition is not *ex debito justitiæ*—it is an extreme measure: *Re Rex v. Hamlink* (1912), 26 O.L.R. 391, *per* Riddell, J., at p. 399. Here a lengthy investigation has taken place without objection until the evidence is in and the matter ready for argument. If the Judge is wrong in assuming jurisdiction, the parties interested have an appeal from any order he may make, and I think they are sufficiently protected thereby.

In my opinion, the motion fails, and it is dismissed with costs.

[IN CHAMBERS.]

RE JAMIESON AND INDEPENDENT ORDER OF FORESTERS.

1931.

Insurance (Life)—Designation of Insured's Children as Beneficiaries—Ineffective Attempt to Alter Declaration — Rights of Preferred Beneficiaries—Insurance Act, sec. 119(5), 142 et seq.—Will not a Declaration under the Statute—Power of Appointment.

Jan. 7.

A policy of insurance on the life of J. was issued in 1901, he being then resident in Ontario. The beneficiary designated was his wife. In 1910, she having died, he by a declaration in writing designated as beneficiaries his three children. He married a second time, but his wife left him, and he became estranged from the children of his first marriage. In or before 1923 he scored out the names of his children from the declaration (which was attached to the policy), wrote "none to my family," and signed his name. In 1924, he made a will leaving "all my property both realty and personalty . . . wheresoever situate and over which I may have any power of appointment to Jennie R." Before June, 1929, J. had acquired a domicile in Michigan; in that month he procured from a Michigan court a divorce from his second wife; and in October, 1929, he married Jennie R. According to the law of Michigan, the marriage did not revoke the will, and he died in March, 1930, without having revoked it:—

Held, that J.'s attempt to cancel or alter the declaration was ineffective, and his children, being beneficiaries of the preferred class, continued to be such.

Held, also, that, although the will spoke from the death of J., and Jennie R. was at that time a member of the preferred class of beneficiaries, the will was not a declaration in her favour under the Insurance Act, R.S.O. 1927, ch. 222, secs. 142 *et seq.*

A mere general bequest of personal estate is not a declaration under the statute, unless it is attached to or endorsed on the policy or in some way identifies the policy: sec. 119(5).

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Re Wythe (1926-1927), 59 O.L.R. 546, 60 O.L.R. 323, distinguished.
Murch v. Murch (1922), 53 O.L.R. 188, followed.

The words in the will bequeathing all property over which J. had any power of appointment did not indicate an intention to deal with the insurance, nor were they words of like import with words identifying the policy, etc., as required by sec. 119 (5).

Held, therefore, that the children were entitled to the insurance moneys, and not the widow, the applicant.

Motion made on behalf of Mrs. Jennie Jamieson, the widow of the late John Henry Jamieson, for payment out of court of the proceeds of a policy on the life of John Henry Jamieson. It was opposed by three children of Jamieson by a former marriage, who claimed the money and asked for payment out to them.

The motion was heard by ROSE, C.J., in Chambers.

J. L. G. Keogh, for the widow.

W. R. Willard, for the children opposing the motion.

January 7, 1931. ROSE, C.J.:—The policy, or benefit certificate, was issued in 1901, Jamieson being then resident in Ontario. The beneficiary designated to take in the event of the death of the assured was his wife Agnes. In 1910, the designated beneficiary having died, Jamieson, by a declaration in writing, attached to the policy, approved by the insurers, and sufficient in form to satisfy the Ontario statute, designated as beneficiaries his three children, the respondents on this motion.

Jamieson married a second time, but his wife left him and he became estranged in some way from the children of his first marriage; and in or before the year 1923 he scored out the names of the children from the declaration of change of beneficiary attached to the policy, and wrote, "none to my family," and signed his name. This was of no effect under the rules of the insurers, and, of course, it was ineffective under the Ontario statute, the children being beneficiaries of the preferred class, and continuing, as I understand the law, to be beneficiaries notwithstanding the attempt of the assured to deprive them of the right to receive the insurance moneys in the event of his death. There was here no attempt to designate other beneficiaries of the preferred class, but merely an attempt to exclude the preferred class, and, I suppose, to make the insurance part of the estate of the assured.

In 1924, Jamieson made a will leaving, in these words, all his property to the present applicant:—

"I devise and bequeath all my property, both realty and personalty, of every nature whatsoever, wheresoever situate and over which I may have any power of appointment to Jennie Rowe of 54 Symington Ave. Toronto, absolutely."

Before June, 1929, Jamieson (as the affidavits seem to shew) had acquired a domicile in Michigan, and in that month he procured from the Circuit Court of the County of Wayne, in that State, a divorce from his second wife. In October, 1929, in Michigan, he married the present applicant, the lady to whom he had devised and bequeathed his property. According to the law of Michigan, in which State Jamieson continued to be domiciled until the time of his death, the marriage did not revoke the will—as is sworn to by an attorney-at-law practising in Michigan. Jamieson died in March, 1930, without having revoked the will.

Upon behalf of the widow it is argued—*Re Wythe* (1926-1927), 59 O.L.R. 546, and 60 O.L.R. 323, being cited in support of the contention — that, the will speaking from the death of the assured, and the applicant being at that time a member of the class of preferred beneficiaries, there is a declaration in her favour valid under the Insurance Act, R.S.O. 1927, ch. 222. But the point argued upon the authority of *Re Wythe* does not seem to me to arise, for, in my opinion, the will is not in form one of those declarations by which, under the Insurance Act, secs. 142 *et seq.*, the assured may “from time to time appoint, appropriate or apportion the insurance money, or alter or revoke any prior designation, appointment, appropriation or apportionment, or substitute new beneficiaries.” The definition of the declaration by which the power of the assured may be exercised is contained in sec. 119(5) of the Act. The “declaration,” unless it is attached to or endorsed on the policy, must in some way identify the policy, or describe the subject of the declaration as the insurance or insurance fund or a part thereof or as the policy or policies of the insured, or must use language of like import. The will in the *Wythe* case was such a declaration: it disposed of one-half of the estate of the assured, “including insurance.” But Jamieson’s will contains no similar words, and I think that under the Act as it stands, just as under the Act of 1914 discussed by Mr. Justice Riddell in *Murch v. Murch* (1922), 53 O.L.R. 188, “there must be something indicating that the insurance policy or its proceeds were in mind, and that a mere general bequest of personal estate is not a declaration under the statute.” It is suggested by counsel that this indication of an intention to deal with the insurance may be found in the words bequeathing all personal property over which Jamieson had any power of appointment. I think not. The solicitor who drew the will would hardly have described the policy or the insurance money as property over which Jamieson had a power of appointment, and there does not seem to be in the document any foundation for the belief that Jamieson thought that he

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had a power of appointment over the insurance money exercisable by will: see *per Meredith, C.J.C.P.*, in *Re Baeder and Canadian Order of Chosen Friends* (1916), 36 O.L.R. 30, at p. 35, and *Re Monkman and Canadian Order of Chosen Friends* (1918), 42 O.L.R. 363. Words expressive of a gift of property over which the assured has a power of appointment do not seem to me to be, by themselves, "language of like import" with words "identifying the policy or describing the subject of the declaration as the insurance or the insurance fund or a part thereof or as the policy or policies of the insured."

There will be an order for payment out to the children. Jamieson's obliteration of the written part of the declaration of 1910 was so thorough that I cannot say what shares the children respectively are to take: evidence as to this may be supplied, unless the children are content with an order for payment to them jointly. The applicant must pay the respondents' costs of the motion.

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KEARLEY v. WILEY.

Limitation of Actions—Highway Traffic Act, R.S.O. 1927, ch. 251, sec. 53—Amending Act, 1930, 20 Geo. V. ch. 48, sec. 11—Time for Commencement of Action for Damages Occasioned by Motor-Vehicle—Application of Amending Act—Retrospective Operation.

On the 21st November, 1928, the plaintiff was injured, upon a highway, by a motor-vehicle owned and driven by the defendant; and on the 27th October, 1929, this action for damages was begun. The statement of claim contained many charges of negligence and a general allegation that the defendant was driving his motor-vehicle contrary to the provisions of the Highway Traffic Act. Section 53 of the Act, as found in R.S.O. 1927, ch. 251, and as it stood at the time of the accident and at the time the action was begun, limited the time for bringing an action for damages occasioned by a motor-vehicle to six months from the time when the damages were sustained; but, by the amending Act of 1930, 20 Geo. V. ch. 48, sec. 11, the time was increased to one year:—

Held, assuming that the limitation section applied to this action, that the amendment was not applicable, and the action was not to be taken to have been brought within the time limited;

An action begun after the time limited by the statute that was in force when the writ was issued cannot, because of the amendment, be held to have been begun in time.

It is erroneous to assume that a statute imposing a time-limit for the commencement of actions for damages (or extending a time already limited) is necessarily to be treated as a statute affecting procedure only and so to be given a retrospective effect.

Carlino v. Zimblarte (1927), 60 O.L.R. 269, and *Hughes v. J. H. Watkins & Co.* (1927-26), 60 O.L.R. 448, 61 O.L.R. 587, followed.

MOTION by the plaintiff for the determination of a point of law raised by the pleadings.

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September 25, 1930. The motion was heard by ROSE, C.J., in the Weekly Court, Toronto.

I. Levinter, for the plaintiff.

J. L. G. Keogh, for the defendant.

January 7, 1931. ROSE, C.J.:—The point for determination, as stated in the written consent filed, is whether the plaintiff's action is barred by the limitation section of the Highway Traffic Act, R.S.O. 1927, ch. 251, sec. 53, and amending Acts, "having regard to the amendment of the statute by chapter 48 of the Statutes of Ontario, 1930, section 11."

On the 21st November, 1928, in a street in Toronto, the plaintiff was struck and injured by a motor-car owned and driven by the defendant. The writ of summons in this action for damages was issued on the 27th October, 1929. The statement of claim contains many charges of negligence on the part of the defendant. Most of these are charges which, if established, would support a claim at common law, but there is included a general allegation that the defendant "was driving his motor-vehicle contrary . . . to the provisions of the Highway Traffic Act." The statement of defence denies all the charges of negligence and sets up contributory negligence. The plaintiff replies that, even if he was negligent, the ultimate negligence causing the injury was that of the defendant. The defendant pleads sec. 53 of the Highway Traffic Act of 1927, R.S.O. 1927, ch. 251, "and amending Acts;" the plaintiff replies that sec. 11 of ch. 48 of the Statutes of 1930 "is retrospective and applies to this action." The question argued was as to the validity of this reply; no question was argued as to whether, regard being had to the judgment of Mr. Justice Grant in *Carlino v. Zimblarte* (1927), 60 O.L.R. 269, and the judgments of Mr. Justice Riddell and the Divisional Court in *Hughes v. J. H. Watkins & Co.* (1927-28), 60 O.L.R. 448, 61 O.L.R. 587, there is in any of the plaintiff's allegations a statement of a cause of action to which the limitation section of the Highway Traffic Act is not applicable; and there was no discussion of the question suggested by the judgment of Ferguson, J.A., in *Hughes v. J. H. Watkins & Co.*, 61 O.L.R. at p. 598, as to whether all of the plaintiff's damages were "sustained" on the day on which the plaintiff was injured; and so I take it that the question to be decided is not to be stated quite as generally as in the submission filed, but ought really to be considered to be in effect this: Assuming the action to be one to which the limitation section of

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the Highway Traffic Act applies, is it barred by reason of the fact that it was not brought within six months after the 21st November, 1928, or is the amendment to the Highway Traffic Act made by ch. 48, sec. 11, of the Statutes of 1930 applicable, and is the action to be taken to have been brought within the time limited by the Act? And my answer to the question submitted is to be understood to be correspondingly limited.

Section 53 of the Highway Traffic Act, as printed in the Revised Statutes of 1927, and as it stood at the time of the accident in question and at the time of the issue of the writ, is as follows:—

“(1) Subject to the provisions of subsections 2 and 3 no action shall be brought against a person for the recovery of damages occasioned by a motor-vehicle after the expiration of six months from the time when the damages were sustained.”

The amendment of 1930 substitutes the words “one year” for the words “six months.”

If before the passing of the amending Act the defendant had brought the action to trial, or had taken other relevant steps, no doubt the action would have been dismissed. But the action was not dismissed, and the plaintiff's contention is that it cannot now be dismissed on the ground that it was not commenced within the prescribed six months, because the only limitation now in force is a limitation of one year from the sustaining of the damages, and the action was commenced within that year. The suggestion is that the limitation section is a section regulating procedure only, and that the amendment of 1930 is, therefore, to be construed retrospectively and as governing the case.

A general statement that statutes attaching a time-limit to the assertion of rights of action are necessarily to be held to be statutes relating to procedure only, and therefore *primâ facie* retrospective, is too broad, as appears from Mr. Justice Duff's judgment in *Upper Canada College v. Smith* (1920), 61 Can. S.C.R. 413; and in *Stephenson v. Parkdale Motors* (1924), 55 O.L.R. 680, Mr. Justice Logie held, giving effect to his reading of the *Upper Canada College* case, that what is now sec. 53 of the Highway Traffic Act was not retrospective, in such sense as to bar an action, begun after the commencement of the Act, to enforce a claim that had arisen before the Act came into force and more than six months before the issue of the writ; and his judgment was upheld by the Appellate Division (1924), 56 O.L.R. 180; and in *Carlino v. Zimblarte* (1927), 60 O.L.R. 269, Mr. Justice Grant held that sec. 43a (which came into force in April, 1926, and which made sec. 53 inapplicable to any action brought by a passenger

against the owner or driver of a motor-vehicle in respect of injuries sustained by the plaintiff while a passenger) was not retrospective in such sense as to apply to an action brought in May, 1926, to recover damages for injuries sustained in July, 1925.

It will be observed that the position of the plaintiff in the case last cited was apparently more favourable than that of the plaintiff in the present case, inasmuch as *Carlino's* writ was not issued until after the passing of the statute (the present sec. 53(4)) by which the six months' limitation (sec. 53) was made inapplicable to actions such as his, whereas the plaintiff in the present case must fail unless the Act of 1930 can be held to render effective the writ issued ineffectively in 1929; and it is difficult to discover any logical reason why, if *Carlino*, the bar to the enforcement of claims such as his after six months having been removed, could not maintain an action, the present plaintiff can, because of the change of the law in 1930, maintain an action begun in 1929 in respect of an injury the remedy for which had been barred before the writ was issued.

I think that there are two misconceptions at the base of the contention advanced on behalf of the present plaintiff. First, I think it is erroneous (as the cases just cited shew) to assume that a statute imposing a time-limit for the commencement of actions for damages (or extending a time already limited) is necessarily to be treated as a statute affecting procedure only, and is to be given a retrospective effect. And, secondly, I think that the contention is based upon a misconception as to the retrospective effect that is to be given to such statutes affecting procedure as are construed retrospectively. If the amendment of 1930 had been passed within the year following the day on which the plaintiff was injured, and if it had been capable of retrospective construction, then an action begun within the year, but after the expiration of the six months limited by the Revised Statute, would have been held to have been begun in time—the amendment, because retrospective, would have regulated the time for taking proceedings to enforce a pre-existing right. But that is not the kind of retrospective effect for which counsel for the plaintiff contends. He would make the amendment operate, not to regulate the procedure to be followed in the enforcement of the right, but to give to a proceeding taken before the amendment was made an effect which the law did not give to that proceeding at the time when it was taken; but, so far as I am aware, there is no warrant in the authorities for holding, in the professed retrospective construction of a statute worded at all similarly to the section under consideration, that the statute has rendered a previously ineffective act effective or has destroyed the effect of a previously effective act. If the

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amendment of 1930 had abridged the time theretofore allowed for the commencement of an action, no one, I think, would have suggested that an action already commenced within the time limited by the law in force at the time of the issue of the writ, but not within the time limited by the amending Act, was to be held, because of the amendment, to have been begun too late; and I think that in the converse case (which the present is) it cannot be held that an action begun after the time limited by the statute that was in force when the writ was issued is to be held, because of the amendment, to have been begun in time: no one would have said that a right to sue, existing and exercised before sec. 53 of the Revised Statute came into force, was affected by that section; and I do not think that it can be said that the present action, begun when there was no right to sue, is made effective by the amendment, passed after the time limited by the amendment for commencing an action.

The point of law raised by the notice of motion is to be determined in accordance with the foregoing reasons. The plaintiff must pay the costs.

[RANEY, J.]

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Limitation of Actions—Tenants in Common of Land—Agreement between—Evidence—Corroboration—Evidence Act, R.S.O. 1927, ch. 107, sec. 11—One Tenant Living on Land—The other Absent but Occasionally Returning—Payment of Taxes—Repairs and Statute Labour—Assessment—Claim of Title by Adverse Possession—Limitations Act, R.S.O. 1927, ch. 106, secs. 4, 5(1), (6), (7)—Tenancy from Year to Year—Discontinuance of Possession.

Two brothers, J. and B., were tenants in common of land with a house upon it under the will of their mother, who died in 1900. Neither of them married. After their mother's death, they lived together on the land for two or three years. Then B. obtained employment and went to live elsewhere, and after that returned to the land and house at intervals which were sometimes as great as three or four years. Some of the furniture in the house was his. J. continued to live in the house until he died in January, 1930. B. said that in 1903 he and J. made an agreement that J. should stay and take care of the place, paying the taxes and doing the repairs and the statute labour, "as long as it was agreeable." The property was always assessed to the two jointly. J. paid the tax-bills, did the road-work and repairs, and never sought contribution from B. In October, 1929, J. made his will, leaving "the house and premises . . . which have been occupied by me since 1900" to the defendant. As late as 1927 or 1928, J. had told the assessor that the property belonged to him and B. jointly, and that the assessment was to be continued in that way. The will was proved by the defendant, who had been J.'s housekeeper, and she remained in possession. Apparently, until

about the time he made the will J. had never conceived the idea that he had in 1913 acquired a legal title to his brother's interest. In an action brought by B. for a declaration that he was tenant in common with the defendant and for partition or sale:—

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Held, that the evidence of the plaintiff as to the agreement with his brother should be accepted, and was sufficiently corroborated to satisfy sec. 11 of the Evidence Act by J.'s failure to require the plaintiff to share the burden of the taxes, road-work, and repairs, taken in conjunction with all the other factors in the case.

Held, also, that the effect of the agreement was to create a tenancy at will, not a tenancy from year to year.

East v. Clarke (1915), 33 O.L.R. 624, applied.

Section 5, subsecs. 1, 6, and 7, of the Limitations Act, considered.

If there was no tenancy, the question whether the plaintiff in 1903 discontinued possession of his interest in the property arose. Discontinuance of possession, under sec. 5(1), is a question of fact, compounded of intention and action. When dispossession or discontinuance of possession is to be inferred from equivocal acts, the intention with which the acts are done is all-important. The onus of proving discontinuance was on the defendant who affirmed it, and the possession must be such as involves the exclusion of the true owner. The evidence submitted by the defendant did not satisfy the onus. It never was the intention of the plaintiff, apart from the tenancy, to discontinue possession, and it never was the intention of J., until just before his death, to take advantage of his brother's absence.

AN action for a declaration that the plaintiff was tenant in common with the defendant Elmira Lillian Skidmore of a house and lot in the hamlet of Homer, in the township of Grantham. The defence was the Statute of Limitations.

The action was tried before RANEY, J., without a jury, at St. Catharines.

Gordon Waldron, K.C., for the plaintiff.

Shirley Denison, K.C., and *G. M. Lampard*, for the defendants.

January 9, 1931. RANEY, J.: — The defendants, mother and son, are respectively the devisee and executor of Jonas Alexander Stevens, a brother of the plaintiff, Brock Stevens. The brothers took the property in question as tenants in common under the will of their mother, who died in the year 1900. Neither of the brothers ever married. After their mother's death, they lived together on the property for two or three years. Then Brock obtained employment in Dunnville, and after that returned to Homer at intervals which were sometimes as great as three or four years. Some of the furniture in the house was his. This remained in the house and is still there, and when he visited his brother during the years intervening between 1903 and the death of Jonas on the 1st January, 1930, and remained over night, he slept in his own bed.

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In 1903, after Brock decided to remain in Dunnville, he says, he and Jonas talked over the matter of the property, and reached an agreement that Jonas, who was a carpenter and painter, would stay and take care of the place, paying the taxes and doing the repairs and the statute labour. This he says was to be "as long as it was agreeable."

In 1905 Jonas brought in his cousin Mrs. Skidmore, one of the defendants, as his housekeeper, and she remained with him until his death.

The property was always assessed to the brothers jointly. Sometimes the tax-bills were made in the same way and sometimes to Jonas, who always paid them. Jonas also did the road-work and repairs, and never sought any contribution on account of these matters from Brock.

In 1922, when Mrs. Skidmore was on a visit to Brock at Dunnville, she asked him if he would sell his interest in the property. He made no answer, and when on her return to Homer she mentioned the matter to Jonas, he in turn made no answer.

Though afterwards Brock refused to join Jonas in a mortgage to raise money on the property, they remained the best of friends until the death of Jonas.

On the 21st October, 1929, Jonas wrote to Brock asking him to come to see him. Brock came and remained three or four days. Brock says, and I accept his statement, that at that time Jonas wanted either to buy his interest, or to sell to him. He wanted to raise money. Brock did not give him an answer then, but he was to think it over and return in a few days. When he came back in about ten days, he found his brother too ill to do business, and Jonas died on the 1st January, 1930. But in the meantime, on the 29th October, 1929, that is to say almost immediately after Brock's October visit, Jonas made his will, leaving "the house and premises . . . which have been occupied by me since 1900" to Mrs. Skidmore. There was no explanation at the trial of Jonas's change of attitude between the time of his request to Brock to buy or sell and the making of the will, which was, of course, on the assumption that Jonas owned the entire property. The recital "which have been occupied by me since 1900" suggests that some one had told Jonas that he had acquired his brother's interest by adverse possession. Perhaps there is a partial explanation in the circumstance that at the time of the making of the will Jonas stipulated that Brock should be paid \$500.

I am satisfied that until very shortly before his death it had never occurred to Jonas to set up title to the entire property, and that he never conceived the idea, until about the time of the making

of the will, that he had acquired a legal title to his brother's interest in the year 1913. As late as 1927 or 1928, Jonas had told the township assessor that the property belonged to him and Brock jointly, and that the assessment was to be continued in that way, as it had been for nearly thirty years. Mrs. Skidmore and her son always understood, until the making of the will, that Jonas and Brock were joint owners.

The defendants rely upon secs. 4, 5(1), and 11 of the Limitations Act, R.S.O. 1927, ch. 106. Omitting the words that are redundant, for the purposes of this case, these sections read as follows:—

4. No person shall bring an action to recover any land, but within ten years next after the time at which the right to bring such action first accrued to such person.

5.—(1) Where the person claiming such land has been in possession and has been dispossessed, or has discontinued such possession, the right to bring an action to recover such land shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession.

11. Where one tenant in common has been in possession of the entirety for his own benefit, such possession shall not be deemed to have been the possession of the other tenant in common.

Of course, if there was a tenancy from 1903 until the death of Jonas, then the statute did not begin to run. The only direct evidence as to a tenancy is that of the plaintiff himself.

At the trial, I said that I accepted the evidence of the plaintiff as to the agreement with his brother; but, though I accredited the plaintiff's evidence, I am not free to give effect to it without the corroboration "by some other material evidence" required by sec. 11 of the Evidence Act, R.S.O. 1927, ch. 107.

The "other material evidence" need not be direct testimony by a witness; it may be afforded by circumstances: *Thompson v. Coulter* (1903), 34 Can. S.C.R. 261, 263; or "may consist of inferences or probabilities arising from other facts and circumstances tending to support the truth of the witness's statement:" *Green v. McLeod* (1896), 23 A.R. 676, 678.

It is true that the payment of the taxes and the doing of the road-work and the repairs were equivocal acts which may as readily be attributed to Jonas's co-ownership of the property as to the tenancy alleged by the plaintiff: *Elgin v. Stubbs* (1928), 62 O.L.R. 128; but Jonas's failure to require the plaintiff to share the burden of these things was not equivocal, and, taken in conjunction with all the other factors of the case, amounts, I think, to corroboration sufficient to satisfy the statute.

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There is nothing to suggest that there was anything to the advantage of Jonas in the absence of Brock from the property after 1903, or, apart from the alleged agreement, any reason why he should not have asked Brock to contribute to the taxes, road-work, and repairs—and this particularly of late years when Jonas was ill and in need of money. At any time after 1903, if there was no tenancy, Jonas might very well have said to Brock: "Here is the house, you are entitled to occupy it jointly with me, and, whether you do or not, you ought to contribute your share towards the charges for the protection and up-keep of the property." Jonas did nothing of this kind.

Counsel for the defendants submitted, as an alternative to his main argument, that if any tenancy was created in 1903 it was a tenancy at will, and that under sec. 5(7) of the Limitations Act time would begin to run one year from its creation, namely: in 1904, or the beginning of 1905.

The section cited provides that where a person is in possession of land as tenant at will, the right of the landlord to bring an action to recover such land "shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined." This language is quite different from that of the next preceding subsection, which deals with tenancies from year to year, and provides that in such cases the landlord's right to bring an action to recover such land "shall be deemed to have first accrued at the determination of the first of such years . . . or at the last time when any rent payable in respect of such tenancy was received, whichever last happened."

Both points, that is to say, the question whether the tenancy was a tenancy from year to year, or at will, and the question of the construction of subsec. 7, were raised and considered in *East v. Clarke* (1915), 33 O.L.R. 624. In that case, the agreement was that the tenant should have the use of the land until a purchaser was found, he to pay the taxes as rent in the meantime. In that case, the Appellate Division of this Court agreed with the trial Judge that the effect of the agreement was to create a tenancy at will—having regard, I suppose, to the fact that in the event of a sale the owner could have promptly ejected the defendant. In the present case, the effect of the agreement was, I think, to create a tenancy from year to year—the taxes and the road-work were to be paid and performed annually, and there was no condition such as there was in the agreement in *East v. Clarke* to ground an implication of a tenancy at will. But nothing really turns on the question as to whether the tenancy in the present case was a tenancy from year to

year or a tenancy at will, because under the judgment in *East v. Clarke*, following *Day v. Day* (1871), L.R. 3 P.C. 751, the two sub-sections are to have a similar construction. In *Day v. Day* the Judicial Committee of the Privy Council had said, dealing with an appeal from New South Wales, where the question arose under sections not unlike our subsecs. 6 and 7 (see p. 761): "When the statute has once begun to run it would seem on principle that it could not cease to run unless the real owner, whom the statute assumes to be dispossessed of the property, shall have been restored to the possession. He may be so restored either by entering on the actual possession of the property, or by receiving rent from the person in the occupation, or by making a new lease to such person, which is accepted by him; and it is not material whether it is a lease for a term of years, from year to year, or at will."

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Adopting this language, Mr. Justice Garrow, speaking for the Court in *East v. Clarke*, remarked: "Accepting this as a binding statement of the law, the result seems to be to give to the payment of rent in the case of a tenancy at will the effect of a similar payment of rent under subsec. 6, which seems reasonable."

If I am wrong as to the tenancy, then the question still remains, under sec. 5(1) of the Limitations Act, whether Brock discontinued possession of his interest in the property in 1903. In other words, assuming that there was no tenancy, did the statute begin to run against Brock in that year?

Discontinuance of possession, under the section, is a question of fact, compounded of intention and action. The intention is of no consequence if the action is definite and unequivocal; but when dispossession (in this case, discontinuance of possession) is to be inferred from equivocal acts, the intention with which the acts are done is all-important: Banning on Limitation of Actions, 3rd ed., p. 93.

The onus of proving discontinuance of possession by Brock was on the defendants who affirmed it, and it is well-settled law that the possession to be relied upon by a claimant under the statute must be such as involves the exclusion of the true owner: *Rooney v. Petry* (1910), 22 O.L.R. 101, 105. This principle was elaborated by Lord O'Hagan in *Lord Advocate v. Lovat* (1880), 5 App. Cas. 273, 288, as follows: "As to possession it must be considered in every case with reference to the peculiar circumstances . . . the character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests; all these things, greatly varying as they must under various condi-

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tions, are to be taken into account in determining the sufficiency of a possession."

This statement of the law was approved by Lord Macnaghten in *Johnston v. O'Neill*, [1911] A.C. 522, 583, and by the judgment of the Privy Council in *Kirby v. Cowderoy*, [1912] A.C. 599, 603.

Applying these tests, the evidence submitted by the defendants did not, I think, satisfy the onus cast upon them. The plaintiff never was excluded from the property; he came and went as he saw fit, infrequently it is true, but usually once a year or so. His personal property always remained on the land, and was always recognised by Jonas as his property. It is of no consequence that the furniture may not have been of any great value—it was of sufficient value not to be negligible. Moreover, to whatever extent intention may be a factor, I have no hesitation in finding on the evidence that it never was the intention of Brock, apart from the tenancy, to discontinue possession of the property, and that it never was the intention of Jonas to take advantage of his brother's absence until, at all events, just before his death.

There will be judgment for a sale of the land and a division of the net proceeds on the basis of a tenancy in common subsisting between the brothers at the death of Jonas, and for delivery to the plaintiff of his personal effects. To these, I understood at the trial, the defendants make no claim.

The plaintiff will have the costs of the action.

[APPELLATE DIVISION.]

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TOWN OF MERRITTON V. NIAGARA ST. CATHARINES AND TORONTO
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Municipal Corporations—Street Railway—Franchise Agreement—Termination by Effluxion of Time—Construction of Municipal By-law and Agreement—Reservation—1 Edw. VII. ch. 76 (D.)—7 & 8 Edw. VII. ch. 13½, sec. 2 (D.)—Ontario Railway Act, 1913, 3 & 4 Geo. V. ch. 36, sec. 2½—Village Corporation Becoming Town Corporation—Constitutional Jurisprudence—Right of Municipality to Take over Street Railway.

The judgment of GARROW, J. (1930), 65 O.L.R. 563, was affirmed on appeal (MIDDLETON, J.A., dissenting).

Held, by MULOCK, C.J.O., and MAGEE, J.A., that, as the Dominion statute 1 Edw. VII. ch. 76, which authorised the defendant company to acquire the line of the Port Dalhousie, etc., Railway Company, reserved to the plaintiff corporation the benefit of any agreement between it and the company respecting the railway, and the effect of that reservation was that the rights of the plaintiff corporation and the defendant company arising out of the agreement of the 23rd July, 1914, were to be governed solely by its terms, and there-

fore were determinable by the courts as are rights arising out of contract, it followed that, the parties to that agreement having agreed between themselves that the franchise was limited to the period of 15 years, the defendant company, on the expiry of that term, ceased to be entitled to retain its railway on the streets.

The plaintiff corporation not desiring to assume ownership of the railway, sec. 246 of the Ontario Railway Act, 1913, 3 & 4 Geo. V. ch. 36, had no application.

In 1918, when Merritton was incorporated as a town, sec. 2 of the Dominion Act 7 & 8 Edw. VII. ch. 134 became applicable to it, and the defendant company ceased to be entitled to operate its railway upon the streets of the town.

While the Canadian National Electric Railways and the Corporation of the City of St. Catharines may have acquired some right to operate a street railway in Merritton, there was no evidence that the defendant company had such right, and it was not entitled to set up the rights of third parties as a defence to this action.

Per HODGINS and GRANT, J.J.A.:—To hold that the defendant railway company could validly bind itself to submit to the orders of the Ontario Railway and Municipal Board, or that the terms of the Ontario Railway Act, where they do not conflict with the terms of the agreement, should be binding upon it, is, in effect, in view of the position of the company as a Dominion railway company, to allow the parties to make substantive law for themselves by agreement, and to withdraw the company from its subjection to Dominion legislation, and that is not competent under our constitutional jurisprudence. Therefore, the defendant company cannot rely upon clause 20 of the agreement as bringing in the provisions of the Ontario Railway Act, and particularly sec. 246, as binding upon the plaintiff corporation. The right of the defendant company was terminated at the end of the 15 years, granted by by-law 271; and, the plaintiff corporation having in 1918 become an incorporated town, the defendant company ceased to have any continuing right, unless by consent of the plaintiff corporation, which was not suggested.

Per MIDDLETON, J.A. (dissenting):—While the rights of the plaintiff corporation and the defendant company arising out of the agreement of the 23rd July, 1914, are governed solely by its terms, and are determinable by the courts as rights arising out of contract, the provisions of the Ontario Railway Act, 1913, apply to and govern it. By subsec. 1 of sec. 46, the municipality may, after giving the company one year's notice prior to the expiration of the franchise period, assume the ownership of the railway, etc. At the expiration of the franchise, it may take over the ownership or it may allow the franchise to continue for another five years, and the privileges of the company shall continue until the ownership is assumed by the corporation; but it cannot allow the franchise to expire and then exclude the company from the operation of its undertaking upon the streets of the municipality.

AN appeal by the defendant company from the judgment of GARROW, J. (1930), 65 O.L.R. 563.

October 31 and November 11, 1930. The appeal was heard by MULLOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

A. Courtney Kingstone, K.C., and R. E. Laidlaw, for the appellant company, denied that its rights under the agreement with the plaintiff corporation of the 23rd July, 1914, had terminated as of

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the 28th July, 1929, or that its franchise had come to an end by effluxion of time. By virtue of the provisions of the agreement and the by-laws of the plaintiff corporation relating to it, the appellant company was entitled to rely on sec. 246 of the Ontario Railway Act, 1913, 3 & 4 Geo. V. ch. 36, that section having been incorporated in and forming part of the agreement. The plaintiff corporation had not taken the proper steps under the enactment to terminate the rights of the appellant company, and so these rights still continue. In order to terminate these rights the plaintiff corporation would have to take over the railway's franchise at a valuation, on one year's notice. Apart from the agreement, under the provisions of 1 Edw. VII. ch. 76 (Dom.), the appellant company came under the exclusive legislative jurisdiction of the Dominion Parliament, and its rights could be terminated only by Dominion legislation. Reference to *Littley v. Brooks and Canadian National Railway Co.*, [1930] S.C.R. 416; *County of Wentworth v. Hamilton Radial Electric Railway Co. and City of Hamilton* (1916), 35 O.L.R. 434, 54 Can. S.C.R. 178.

G. R. Geary, K.C., and *A. W. Marquis*, K.C., for the plaintiff corporation, respondent, contended that the appellant company, being of Dominion and not of provincial origin, is subject only to the provisions of the Dominion Railway Act, and as a result the parties could not impose the burdens and obligations of the Railway Act of Ontario upon a railway declared to be a Dominion railway. The wording of the by-law shews that it was the intention of the parties that the Ontario Railway Board should merely have jurisdiction to deal with matters in dispute. If it was the intention of the parties to make the entire Ontario Railway Act applicable, it was unnecessary, by clause 7 of the by-law, to provide that certain specific clauses of sec. 259 of the Act should apply. The railway in question is not a street railway coming within the provisions of sec. 246 of the Ontario Railway Act, 1913. Section 2 of that Act defines "street railway" as a railway constructed or operated along or upon a highway under an agreement with or by-law of a city or town. In 1914 Merritton was merely a village. Therefore this section is not applicable. Reference to *Montreal Tramways Co. v. Lachine Jacques-Cartier and Maisonneuve Railway Co.* (1914), 50 Can. S.C.R. 84; *In re Columbia and Western Railway Co.* (1901), 2 Can. Ry. Cas. 264; *Clegg v. Grand Trunk Railway Co.* (1886), 10 O.R. 708, at p. 712; *Re Niagara St. Catharines and Toronto Railway Co.* (1924), 15 Judgments of Railway Commissioners for Canada 83, at p. 87; *Attorney-General of British Columbia v. Vancouver Victoria and Eastern Railway and Navigation Co.* (1902), 3 Can. Ry. Cas. 137; *Increase in Passenger*

and *Freight Tolls* (1917), 22 Can. Ry. Cas. 49, 57-60; *Grand Trunk Railway Co. of Canada v. Washington*, [1899] A.C. 275, at p. 280; MacMurchy and Denison's *Railway Law of Canada*, 3rd ed., p. 45.

Kingstone, K.C., in reply. In 1901, when the appellant company became a Dominion railway, there was no restriction on any Dominion railway running on any provincial highway or street of a municipality. The agreement of 1914 was merely a consent on the part of the railway company to submit for a period of 15 years to the rules and regulations of the municipality. That period having come to an end, the appellant company is under no restriction. The agreement of 1914 was not necessary to the defendant company. It was operating as of right and continues so to operate without any regulation whatever outside of the Dominion Railway Board. It has an untrammelled franchise. It comes under the provisions of sec. 246 of the Ontario Railway Act because it was already operating in 1918, when Merritton became a town.

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January 12, 1931. MULLOCK, C.J.O.:—This action was brought by the plaintiff corporation against the defendant company for a declaration that the right of the company to maintain and operate a street railway on certain streets in the town of Merritton had expired on the 28th July, 1929, and that it should be ordered to remove its railway tracks.

The history of the transactions out of which this action arose is as follows:—

In 1874 a company called the St. Catharines Street Railway Company was incorporated by the Legislature of Ontario (38 Vict. ch. 63) and was granted by what was then the Corporation of the Village of Merritton, but now the Town of Merritton, a franchise to construct and operate a street railway on certain streets in the village of Merritton. As authorised by its Act of incorporation, the St. Catharines Street Railway Company entered into an agreement with the plaintiff corporation bearing date the 27th March, 1877, whereby, as authorised by its by-law No. 34, the plaintiff corporation granted to the St. Catharines Street Railway Company the right to construct and operate a street railway on certain streets in the village of Merritton, but for no fixed period of time.

In 1879, the St. Catharines Street Railway Company constructed upon the streets in Merritton the line of railway in question here. Later, the Port Dalhousie St. Catharines and Thorold Electric Street Railway Company acquired it together with all the rights and privileges attached thereto.

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On the 25th July, 1894, the Corporation of the Village of Merritton, by by-law No. 117, granted to the Port Dalhousie St. Catharines and Thorold Street Railway Company the right to lay down a track for a railway along certain streets in the village of Merritton and to operate thereon railway cars; the last clause in the said by-law being as follows: "All by-laws heretofore passed by the said corporation conferring any rights or privileges upon the St. Catharines Street Railway are hereby repealed." This by-law, like its predecessor, did not fix the limit to the duration of the privileges thereby granted.

By agreement bearing date the 14th August, 1894, between the St. Catharines Port Dalhousie and Thorold Electric Street Railway Company and the Corporation of the Village of Merritton, the last named company covenanted with the municipal corporation "to abide by the terms of said by-law, a copy of which is hereunto" (that is to the agreement) "annexed."

On the 14th August, 1894, the Corporation of the Village of Merritton passed by-law No. 118 to amend by-law No. 117, wherein, after reciting that no time was fixed by by-law No. 117 during which the company should be entitled to enjoy the privileges then granted, and that it was desirable that the by-law should be amended, proceeded to enact "that the rights and privileges hereby granted shall continue for the period of 20 years from the date of the passing of this by-law, subject to the provisos and conditions hereinafter set forth and contained." Whether by oversight or otherwise, the agreement last mentioned does not apply to by-law No. 118.

The Port Dalhousie St. Catharines and Thorold Electric Street Railway Company, the then owner of the railway, continued to operate it until the year 1903, when the defendant acquired and has ever since operated it.

In 1899 the defendant company was incorporated by Act of the Parliament of Canada, 62 & 63 Vict. ch. 77, and in 1901, by Act of the Parliament of Canada (1 Edw. VII. ch. 76), was empowered to acquire the line of railway in question and to operate and to maintain the same, but "subject to the rights, positions and powers of any municipal corporation under any statute, by-law, agreement or otherwise, all of which rights, positions and powers may be exercised and enforced as against and with respect to the Niagara St. Catharines and Toronto Railway Company and the undertakings, rights, franchises, powers, lines, assets and properties so acquired by it, in the same manner and to the same extent and as fully as they could or might be exercised and enforced as against and with respect to the company entering into such agreement and its undertakings, rights, franchises, powers, lines, assets

and properties." For the moment I postpone discussing the effect of this reservation of the rights of the corporation.

The defendant company, being so authorised by the Act of 1901, acquired, in or about the year 1905, the railway with the rights, privileges and franchises attaching thereto, entered into possession, and continued to operate the line throughout the remainder of the 20-year period mentioned in by-law No. 118.

On the 14th July, 1914, the plaintiff corporation passed by-law No. 271, which, after reciting that the franchise originally granted to the line of railway had expired and that it was advisable to renew the same for the term and upon the terms and conditions therein set forth, granted permission to lay out, construct and operate a street railway on certain of the streets of Merritton. This by-law contained the following clauses:—

"17. The rights and privileges hereby granted shall continue for the period of 15 years from the date of the coming into effect of this by-law, subject to the provisions and conditions herein set forth and contained being strictly performed and observed."

"20. All matters of dispute under this agreement may be referred by either party to the Ontario Railway Board, who shall hear all matters relating to an alleged violation of the terms of this agreement, and shall make such order as to it may seem just as provided for under the Ontario Railway Act, 1913; and the provisions of which said Act, in so far as they do not conflict with the terms of this agreement, shall form part of this agreement and are binding upon both parties."

It also contained the following term:—

"All by-laws heretofore passed by the said corporation conferring any rights or privileges upon the Port Dalhousie St. Catharines and Thorold Electric Street Railway Company, or in any way relating to the same, are hereby repealed as and from the 28th day of July, 1914, upon which date this by-law shall come into effect."

By agreement dated the 23rd July, 1914, made between the defendant company and the plaintiff corporation, after referring to by-law No. 271, it is declared that:—

"The railway accepts the terms of the said by-law and agrees to perform and observe all the terms and conditions thereof, and the company agrees with the railway, their successors and assigns, that the railway shall enjoy the privileges granted by the said by-law, subject to the provisions therein set forth."

On the 28th July, 1929, the term of 15 years granted by by-law 271 and the agreement terminated, but the company has continued to operate the line. The plaintiff corporation claims

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that the defendant company is no longer entitled to maintain or operate its railway on the streets of Merritton and should be ordered to remove the same.

In the course of the argument before us it was observed that, inasmuch as the line of railway crossed a Dominion railway, it came under the exclusive legislative jurisdiction of the Parliament of Canada, and that therefore the right to continue to operate on the streets of Merritton could be terminated only by Dominion legislation; but the Act of the Parliament of Canada above mentioned, namely 1 Edw. VII. ch. 76, which authorised the defendant company to acquire the line in question, reserved to the corporation the benefit of any agreement between it and the company respecting the railway.

I am of opinion that the effect of such reservation was that the rights of the plaintiff corporation and the defendant company arising out of the agreement of the 23rd July, 1914, were to be governed solely by its terms, and therefore were determinable by the courts as are rights arising out of contract. Thus it follows that the parties to the agreement of the 23rd July, 1914, having agreed between themselves that the franchise was for a limited period, namely, 15 years, the defendant company, on the expiry of that term, ceased to be entitled to maintain its railway on the streets.

The defendant company, however, contends that by reason of clause 20 of by-law No. 271 the provisions of the Ontario Railway Act, 1913, 3 & 4 Geo. V. ch. 36, became incorporated in the agreement, and that sec. 246 of that Act entitled the company to one year's notice by the plaintiff corporation of its intention to resume ownership of the railway; that such notice had not been given; and that therefore the plaintiff corporation is not entitled to the relief claimed.

Section 246 does not require the corporation to give any notice of its intention merely to assume possession of its streets to the exclusion therefrom of the defendant company; it only provides that if a municipal corporation desires to assume by purchase the ownership of a street railway it may do so by giving the notice mentioned in the section. Here, the plaintiff corporation does not desire to assume such ownership, and therefore sec. 246 has no application.

For another reason, also, I think the defendant railway company has ceased to be entitled to operate the railway in question. In 1908 the Parliament of Canada by an Act entitled "An Act respecting the Niagara St. Catharines and Toronto Railway Company," being 7 & 8 Edw. VII. ch. 134, enacted as follows:—

"2. The said company shall not operate its railway as a street railway in any city or town without the consent, expressed by by-law, of the corporation of such city or town. This section shall not, however, be interpreted as impairing any consent already obtained in regard to any portion of the said railway already in operation."

Until 1918 Merritton was an incorporated village, but in 1918 it became an incorporated town, and thereupon sec. 2 of this Act came into force as respecting the Town of Merritton. On the 28th July, 1929, the consent of Merritton to the company operating a line of railway on its streets expired, whereupon, by reason of the express enactment of sec. 2, it ceased to be entitled to operate its railway on the streets of Merritton.

It appears from the reasons for judgment of the learned trial Judge that the defendant company, as another defence, set up an agreement between the Canadian National Electric Railways and the City of St. Catharines, which agreement is set forth in exhibit 12. The effect, if any, of this agreement upon the question in issue here was not argued before us. I have however studied the agreement contained in exhibit 12, and in my opinion it constitutes no defence to this action. The plaintiff corporation is not a party to the agreement and therefore is not bound by its terms. Further, the defendant company, so far as appears, has no interest in it. It may be that the City of St. Catharines and the Canadian National Railways have acquired some right to operate a street railway in Merritton, but there is no evidence that the defendant company has such right, and I fail to understand how it is entitled to set up the rights of third parties as a defence in this action.

For these reasons I think the appeal fails and should be dismissed with costs.

MAGEE, J.A., agreed with MULOCK, C.J.O.

HODGINS, J.A.:—My Lord the Chief Justice and Mr. Justice Garrow, the trial Judge, have given a complete history of the railway company which is the defendant here and of the statutes and by-laws affecting its predecessor, the Port Dalhousie St. Catharines and Thorold Electric Street Railway Company Ltd. (hereinafter referred to as the Thorold railway), and I need not repeat them.

By an agreement dated the 8th July, 1902, the last mentioned street railway company sold its undertaking, franchises, etc., to the defendant company for \$130,000 and the assumption and payment by the purchaser of all the contracts and liabilities of the vendor.

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This agreement provided that it was "subject to the rights, positions and powers of any municipal corporation under any statute, by-law, agreement or otherwise, and every such claim and contract and all such rights, positions and powers may be exercised and enforced as against and with respect to the purchaser, and the undertaking, rights, franchises, powers, lines, assets and properties hereby transferred to it, in the same manner and to the same extent and as fully as they could or might be exercised and enforced as against and with respect to the vendor and its undertakings, rights, franchises, lines, assets and properties."

At the date of this agreement the defendant railway company, by virtue of 1 Edw. VII. ch. 76 (Dom.), had power given to it to take over, "by agreement of lease or purchase," the Thorold railway and its undertaking, rights and franchises, etc. That statute provided that every such agreement should "be subject to the rights, positions and powers of any municipal corporation under any statute, by-law, agreement or otherwise, all of which rights, positions and powers may be exercised and enforced as against and with respect to the Niagara St. Catharines and Toronto Railway Company and the undertakings, rights, franchises, powers, lines, assets and properties so acquired by it, in the same manner and to the same extent and as fully as they could or might be exercised and enforced as against and with respect to the company entering into such agreement and its undertakings, rights, franchises, powers, lines, assets and properties."

It was pursuant to this provision that the agreement of the 8th July, 1902, was made in the terms already quoted.

What then were the rights, positions and powers of the plaintiff, the Municipality of the Village of Merritton, subject to which the defendant railway company acquired the Thorold railway? These are found in by-laws 117 and 118, dated respectively the 25th July, 1894, and the 14th August, 1894. By-law 117 did not limit the duration of the term for which the Thorold railway might operate its street railway on the streets of the plaintiff. But on the 4th August, 1894, the Thorold company having accepted under seal the terms and conditions set out in the by-law 117, the plaintiff on the same day enacted by-law 118, reciting by-law 117, and providing, by the addition to sec. 1 thereof of a subsection, that the rights and privileges granted should continue for 20 years from the 14th August, 1894.

This 20-year term ended in 1914, when the defendant railway company by agreement dated the 23rd July, 1914, accepted the terms and conditions of a by-law, No. 271, which granted the right to the defendant railway company to operate a street railway on

certain streets in Merritton for 15 years from the 28th July, 1914. That term, therefore, expired on the 27th July, 1929.

But it is contended that the agreement accepted by the defendant railway company in July, 1914, contained provisions entitling it to remain on the streets of the plaintiff municipality until expropriated by the plaintiff on due notice, by virtue of sec. 246 of the Ontario Railway Act, 1913. These provisions are as follows:—

“17. The rights and privileges hereby granted shall continue for the period of 15 years from the date of the coming into effect of this by-law, subject to the provisions and conditions herein set forth and contained being strictly performed and observed.”

“20. All matters of dispute under this agreement may be referred by either party to the Ontario Railway Board who shall hear all matters relating to an alleged violation of the terms of this agreement, and shall make such order as to it may seem just as provided for under the Ontario Railway Act, 1913; and the provisions of which said Act, in so far as they do not conflict with the terms of this agreement, shall form part of this agreement and are binding upon both parties.”

The learned trial Judge has held that sec. 20 did not bring into force, as between the parties, the provisions of sec. 246 of the Ontario Railway Act, 1913, but was operative only so far as it related to disputes concerning violations of the agreement between the parties and to the jurisdiction of the Ontario Railway Board arising out of each dispute, and so did not compel the plaintiff to take over the defendant's railway and pay the price for it when fixed by arbitration. Section 246 enacts that any franchise privilege granted by the municipality is not to exceed 25 years, and defines the rights of the respective parties at the termination of the franchise. By subsec. 1, the municipal corporation may, after giving the company one year's notice prior to the expiration of the franchise period, assume the ownership of the railway, and all real and personal property in connection with the working thereof, on payment of the actual value thereof, to be determined by the Railway and Municipal Board. If the corporation does not exercise this right at the expiration of the franchise, it may exercise the like right at the expiration of any fifth year thereafter, upon giving one year's previous notice to the company, “and the privileges of the company shall continue until the ownership is assumed by the corporation.”

Previous to the time at which the defendant railway company's agreement was made with the plaintiff, in 1914, the company had, on the 11th August, 1899, been incorporated by the Dominion Government as a railway, by 62 & 63 Vict. ch. 77 (Dom.) Under that statute all the provisions of the Dominion Railway Act were

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applied to the company. The agreement, therefore, made by it in 1914 was made by it as a company incorporated by Dominion legislation and thereby made subject to the Railway Act. Even accepting the limited scope of the agreement as suggested by the learned trial Judge, I do not see how it can be within the powers of a Dominion corporation to agree, as the defendant railway company did, that all matters of dispute under their agreement should be referred by either party to the Ontario Railway Board, which should hear all matters relating to an alleged violation of the terms of this agreement, and should make such other order as to it might seem just, as provided for under the Ontario Railway Act, 1913. This provision, if validly made, would have the result of placing the defendant company under the jurisdiction of the Ontario Railway Board. The words in the agreement which follow those I have just quoted are, "and the provisions of which said Act" (Ontario Railway Act, 1913), "in so far as they do not conflict with the terms of this agreement, shall form part of this agreement and are binding upon both parties," and are open to the same objection. To hold in this case that the defendant railway company could validly bind itself to submit to the orders of the Ontario Railway and Municipal Board, or that the terms of the Ontario Railway Act, where they did not conflict with the terms of the agreement, should be binding upon it, is, in effect, in view of the position of the company as a railway under Dominion law, to allow the parties to make substantive law for themselves by agreement, and to withdraw the railway company from its subjection to Dominion legislation, at all events so far as the Ontario Railway Act conflicts with or differs from that legislation. This is not in my judgment competent under our constitutional jurisprudence. If no constitutional difficulty arose, and these provisions were made between a railway company and a municipality in Ontario, or between individuals, no question would have arisen; but, as these provisions are the only ones on which the continuance of the franchise are based, in the sense that they would make sec. 246 of the Ontario Railway Act applicable, I am unable to see my way out of the difficulty I have mentioned.

The inability of private individuals to provide that acts which they do, to which the law attributes certain legal consequences, shall not have that effect, is evidenced by such cases as *Furnivall v. Coombes* (1843), 5 M. & G. 736, and *Rex v. Paulson*, [1921] A.C. 271, while the decisions centreing upon the decision in *Bidulph and District Agricultural Society v. Agricultural Wholesale Society*, [1927] A.C. 76, make it clear that a contract purporting to enlarge the limited liability of shareholders beyond that warranted by the Companies Acts is invalid. In Canada the jurisdic-

tion over provincial railways or street railways and that affecting railways subject to Dominion legislation is very clearly defined. If it were otherwise great confusion would exist.

It will be remembered that in the case of *Little v. Brooks and Canadian National Railway Co.*, [1930] S.C.R. 417, the Supreme Court of Canada determined that regulations made by the Ontario Railway and Municipal Board, while a street railway was under its jurisdiction, entirely ceased to apply to the company when it became subject to the authority of the Dominion.

That Court said (pp. 424 and 425) :—

“The Board of Railway Commissioners for Canada, under whose jurisdiction the railway was placed, was immediately vested with full and exclusive authority to make orders in respect of Dundas-street crossing. This authority was to be exercised unhampered by any pre-existing regulation or order of the provincial board, which could not be done unless the effect of section 7 is to exclude all such regulation, for the Dominion Railway Act contains no provision empowering the Board of Railway Commissioners to rescind or cancel the regulation or order. We think, therefore, the latter had no continuing effect once the road has become a Dominion railway. But, contrary to what was urged before us, this does not make for a period of lawlessness, for the federal legislation must be presumed to be adequate to fully cover the situation and there is nothing to prevent the Board of Railway Commissioners from immediately adopting any measures required in special cases. Moreover, the Act of the Parliament of Canada declaring the railway to be a work for the general advantage of Canada might, if thought necessary or desirable, well contain a provision continuing in force provincial orders and regulations and until reconsidered by the Dominion Board.

“The learned trial Judge was therefore right in ruling that the order of the 20th day of September, 1917, was no longer in force as an order binding on the respondent railway company.”

(I might add, by way of parenthesis, that the further view taken by the Supreme Court (p. 426) that the orders of the Ontario Railway and Municipal Board are evidence because “they contain the result of inquiries made . . . under competent public authority in the exercise of a judicial or quasi-judicial duty and concerning matters in which the public are interested.” may have to be reconsidered in view of the decision recently given by the House of Lords in *Shell Co. of Australia v. Federal Commissioner of Taxation* (1930), 47 Times L.R. 115).

In my view, therefore, the defendant railway company cannot rely upon clause 20 of the agreement as bringing in the provisions of the Ontario Railway Act, and particularly sec. 246. as binding

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upon the plaintiff. I think that the right of the defendant railway company was terminated at the end of the 15 years granted by by-law 271, and that, the plaintiff municipality having, in the meantime, become an incorporated town (in 1918), the company ceased to have any continuing right beyond the 15 years, unless it secured the consent, evidenced by by-law, of the Corporation of Merritton as a town under 7 & 8 Edw. VII. ch. 134, sec. 2, which is not suggested.

I would therefore agree with my Lord the Chief Justice in his conclusion that the appeal fails and should be dismissed with costs.

GRANT, J.A., agreed with HODGINS, J.A.

MIDDLETON, J.A.:—I agree with my Lord that the effect of the legislation which he so carefully reviews is that the rights of the plaintiff corporation and of the defendant company arising out of the agreement of the 23rd July, 1914, are governed solely by its terms, and are determinable by the courts as rights arising out of contract.

I am unable to agree with his conclusions as to the effect and meaning of the contract.

It appears to me that the provisions of the Ontario Railway Act in force at the date of the making of the contract govern and apply to it. By this Act, 3 & 4 Geo. V. ch. 36, a right is given to the street railway company to operate upon the streets of any municipality, subject to the terms of any by-law of the municipal corporation and of any agreement that the company may enter into with the municipality. By sec. 246 any privilege granted by the municipality is limited to 25 years, and the rights of the respective parties at the termination of the franchise are defined. By sub-sec. 1, the municipal corporation may, after giving the company one year's notice prior to the expiration of the franchise period, assume the ownership of the railway and all real and personal property in connection with the working thereof, on payment of the actual value thereof, to be determined by the Railway and Municipal Board. If the corporation does not exercise this right at the expiration of the franchise, it may exercise the like right at the expiration of any fifth year thereafter, upon giving one year's previous notice to the company, "and the privileges of the company shall continue until the ownership is assumed by the corporation."

These latter words, I think, exclude the idea that there is any third course open to the municipality. At the expiration of the franchise, it may take over the ownership or it may allow the

franchise to continue for a further period of five years. There is no room for the suggestion that it can allow the franchise to expire and then exclude the company from the operation of its undertaking upon the streets of the municipality. This provision is not new, and the construction which I have suggested has been always accepted—e.g., upon the expiry of the franchise of the old Toronto Street Railway in 1891, the undertaking was taken over by the municipality and a large sum paid, although the old horse-car system operated before 1891 had become obsolete. A similar situation arose on the expiry of the new franchise then granted to the Toronto Railway Company. Upon its expiry there was again an arbitration and a taking over, although practically all that had been taken over had to be destroyed as useless, owing to the advance in railway construction and operation.

This is all in keeping with the legislation commonly called the Conmee clauses of the Municipal Act, under which a municipality was not itself allowed to operate a public utility undertaking in competition with a private undertaking that was operating under municipal sanction, without first offering to take over and pay for that which had been established with municipal approval.

For this reason I think the action fails, and the appeal should be allowed and the action should be dismissed, both with costs.

Appeal dismissed (MIDDLETON, J.A., dissenting).

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[APPELLATE DIVISION.]

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Municipal Corporations—County Highways—By-law of County—Highway Improvement Act, R.S.O. 1927, ch. 54, secs. 5, 6, 28 (5)—16 Geo. V. ch. 15, Amending Earlier Highway Improvement Act—Roads in Village—Suburban Highways—Payments by Village to County—Rebates—Scope of Reference.

Jan. 12.

The judgment of WRIGHT, J. (1930), *ante* 46, dismissing the claim of the plaintiff corporation to recover so much of the county rate as represented debenture debts for works constructed before 1926, was reversed; and it was declared by the Court that, by virtue of sec. 28 (5) of the Highway Improvement Act, R.S.O. 1927, ch. 54, the plaintiff corporation was entitled to a rebate of 75 per cent. of the full amounts paid by the plaintiff corporation to the defendant corporation for road improvements in the years 1926, 1927, and 1928. The underlying principle of the Highway Improvement Act is that it is unjust and inexpedient to cast the whole burden of main highways upon the local municipalities through which they run—these highways serve the community at large, and by the statute an attempt is made to provide for an equitable distribution of the financial burden.

Sections 5 and 6 of the statute considered.

1931. The effect of the change made in 1926, by 16 Geo. V. ch. 15, was to give to a local municipality the *right* to definite relief from the burden of taxation—the extent of aid previously receivable having been dependent upon the goodwill of the county corporation.
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- The amendment made to the statute in 1930, by 20 Geo. V. ch. 10, sec. 5, is no indication of the true construction of the statute as it stood before the amendment.
- The scope of the reference directed by the trial Judge as to suburban roads was amended so as to make it wider.

AN appeal by the plaintiff corporation from the judgment of WRIGHT, J. (1930), *ante* 46.

November 24, 1930. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

A. Courtney Kingstone, K.C., for the appellant corporation, contended that, by virtue of sec. 28(5) of the Highway Improvement Act, R.S.O. 1927, ch. 54, the village is entitled to a rebate of 75 per cent. of the full amounts paid by the village to the county for road improvements for the years 1926, 1927, and 1928. The wording of this section is clear and unambiguous. Nothing in the Act cuts down the right given to the village by this section. The trial Judge erred in holding that the amount of aid which the county was entitled to receive from the Province affected the right of the village to recover the rebate of 75 per cent. from the county. The plain language of sec. 28(5) should not be cut down or interfered with by the amount of the grant which the Province may or may not make to the county. Subsection 2(c), enacted by 20 Geo. V. ch. 10, sec. 5, shews an intention on the part of the Legislature to change the law, and therefore it ought to be presumed that, prior to the enactment, it was the intention of the Legislature to grant the rebate to towns and villages. The reference given by the trial Judge is inadequate. It deals only with debenture debt. It should also have dealt with maintenance charge.

The Hon. George Lynch-Staunton, K.C., and A. W. Marquis, K.C., for the defendant corporation, respondent. All parties had agreed that the county had paid all claims except the debenture debt, and therefore the reference was not inadequate. Section 12 of the Highway Improvement Act provides the machinery by which the county can raise money, and the trial Judge erred in holding that this was not so. Section 14(6) provides another method by which money can be raised, e.g., by debentures. By sec. 12, the county can raise money for construction or maintenance of roadways, whereas sec. 14 makes provision for raising money for construction purposes alone. These sections cannot be read together. The respondent is only forced to rebate 75 per cent. of the amount raised under sec. 12. The Act applies only to money expended after it was first passed, which was in 1926. See the Highway

Improvement Act, 1926, 16 Geo. V. ch. 15, sec. 29, which gives the village the right to the rebate. Reference to Craies on Statute Law, 3rd ed., p. 10. It cannot be inferred from the amendment of 1930 that the Legislature intended the village to get the rebate prior to the passing of the amendment. This enactment was passed merely to clarify the law, not to change it. The trial Judge ought to have found that the rebate is not payable on money raised by debentures, as sec. 28(5) refers to sec. 12 and not to sec. 14: *Smith v. Callander*, [1901] A.C. 297, at p. 305; *Gardner v. Lucas* (1878), 3 App. Cas. 582, at p. 601.

Kingstone, K.C., in reply. It is immaterial whether the Act is or is not retroactive or retrospective. Section 28 (5) merely says that the village is entitled to a rebate of 75 per cent. on the amount raised. Sections 12 and 14 are complementary and not distinct. They can be read together. The words "amount raised," in sec. 28 (5), include debentures.

January 12, 1931. MIDDLETON, J.A.:—Appeal by the plaintiff from the judgment of Mr. Justice Wright, pronounced on the 24th June, 1930, by which he dismissed the claim of the plaintiff to recover so much of the county rate as represented debenture debts for works constructed prior to 1926, and directed a reference to the Master to ascertain the amounts payable to the plaintiff with respect to the construction of suburban roads.

The underlying principle of the Highway Improvement Act is that it is unjust and inexpedient to cast the whole burden of main highways upon the local municipalities through which they may run. These highways serve the community at large, and an attempt is made to provide for an equitable distribution of the financial burden. This is accomplished in two ways. The county is regarded as the primary unit, and it receives, under the statute, financial aid from the Province at large. On the other hand, the small municipality, the town or the village, receives assistance from the county. Before 1926 this was governed by the provisions of the Highway Improvement Act, as found in sec. 5 of R.S.O. 1914, ch. 40, which enabled the county to give a bonus to the local municipality, and provided that the amount of such bonus should be added to the cost of the work undertaken by the county in making its demands upon the Province at large. This left the local municipalities in a precarious plight, the extent of aid receivable by them being dependent upon the goodwill of the county. The change made in 1926 (by 16 Geo. V. ch. 15) was to give to the local municipality a right to definite relief from the burden of taxation created by the undertaking. This

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financial relief was intended to be a real and substantial thing, for it was stipulated that the relief should be 50 per cent. of the cost in the case of towns and 75 per cent. in the case of villages.

A very curious method was adopted of affording this relief. It was not given directly. The local municipalities are expressly made liable to pay in the first instance the full share due by them as part of the normal county rate. The statute as it now stands, R.S.O. 1927, ch. 54, sec. 28 (5), provides that the county "shall on or before the 1st day of April in each year remit" the proportion I have already mentioned "of the amount raised by such rate" (i.e., the county rate) "in the town or village in the previous year," less the cost of repairs, a matter not here in question. This remitted fund is not to form part of the general income of the town or village, but is to be expended by it upon streets in the municipality designated by the Minister, and it is further provided that this rebate is not to be made for any year during which the work of construction or rebuilding of the road is in progress.

Subject to the considerations next to be discussed, this enactment appears to be plain and unambiguous. The right of the village is to receive by way of refund 75 per cent. of the amount included in the county rate for the previous year, as the cost of the construction of the county roads.

The learned trial Judge considered this *primâ facie* and, I think, clear meaning of the statute to be displaced by another statutory provision—a clause which is carried forward in substance from the early legislation, namely, the provision found in sec. 6 that the amount so repaid by the county shall be deemed to form part of the expenditure for carrying out the highway improvement scheme of the county for the purpose of ascertaining the amount of aid which may be granted to the county by the Province under the provisions of the statute. The learned Judge rightly infers that this would mean that the county would receive more than one grant from the Province in aid of the same work, the official grant when the work is undertaken and an additional grant when the county aids the local municipality, and that this conclusively indicates that sec. 5 relied upon by the village cannot have its *primâ facie* significance. I cannot in any way agree with this. I cannot understand why a right plainly conferred upon the village should be taken from it because the right conferred by the county with respect to a refund from the Province is deemed to be unduly in ease of the county. The right of the village is not to be made in this way dependent upon the right of the county. Furthermore, this argument ignores the very im-

portant fact that in the earlier statute of 1914 the Province clearly undertook to share in the burden of the county occasioned by its aid to minor municipalities, and there is no reason to suppose that, when the right of the village was elevated from a claim upon the generosity and sense of fair dealing of the county to a claim as of right, the Government should recede from its willingness to share in the financial relief so granted.

The argument, moreover, really nullifies the benefit conferred upon the minor municipality. There is nothing to prevent the county paying for the construction of the road on the cash basis, and if so the municipality would unquestionably be relieved with respect to its share in the whole cost of the undertaking. The county for its own purposes issues debentures payable over a series of years, and the contention of the county is that by adopting this plan the local municipality is deprived of its right of recoupment with regard to its share of the entire cost and relegated to its share of the amount payable in the first year only, a shocking injustice to the minor municipality, and I should have thought a result clearly contrary to the legislative intention.

There was, however, an amendment made to the statute in the year 1930, 20 Geo. V. ch. 10, sec. 5, which provides that, in determining the amount of the rebate payable in 1931 and thereafter, the amount of the debenture debts and payments on account thereof is not to be taken into consideration. This indicates the legislative will for 1931 and thereafter, but it is no indication of the true construction of the statute as it stood before that date.

There is, however, another argument pressed upon us upon the hearing of the appeal which appears to me to be more formidable. It is said that what is mainly objected to by the county is the giving of a rebate with respect to payments made after 1926, with reference to works constructed before 1926, and that this might possibly produce hardship upon a county which had theretofore voluntarily granted relief to the local municipality under the statute of 1914. It is not suggested that any such relief had been granted in fact by this county to this village, and I do not think that the argument is entitled to prevail as against the clear words of the enactment. The refund is to be made with respect to all moneys which were paid by the local municipality for the construction of the county road. There is no distinction drawn in the Act between payments that are made on account of debentures and payments that are made with respect to new constructions.

The appellant also complains that the terms of the reference as to suburban roads are not sufficiently wide. Counsel for the

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respondent agree with this contention and the reference should be amended accordingly.

The result is that the appeal is allowed, and a declaration should be made in accordance with the above finding, with the appropriate reference if the parties cannot agree upon the figures.

HODGINS, J.A.:—I am in agreement with my brother Middleton in this case. As I understand the scheme of the Highway Improvement Act, R.S.O. 1927, ch. 54, as given in sec. 12, a county council can, subject to the approval of the Lieutenant-Governor in Council, initiate a plan of county road improvement by assuming roads within the county, and may, with certain exceptions, tax for that purpose all municipalities in the county (not separated therefrom for municipal purposes) by a general annual rate. The money thus raised is to be expended in the construction, improvement, maintenance and superintendence of roads in the county system. Debentures may be issued pursuant to a by-law to meet the estimated expenditure for the construction and improvement of these highways under the Act.

By sec. 28, subsec. 5, of the same Act it is provided that a village not separated from the county for municipal purposes shall be subject to the annual general levy for county road purposes under such a by-law as I have just mentioned.

But there is to be a refund made by the county to such a village of 75 per cent. of the amount raised in it by the annual rate, less the cost of repairs, if any, done upon any county road extension or connecting link, or on any road in the village included in the previous year in the county road system. Such rebate is not to be made in any year when the construction or rebuilding of any such county road extension or connecting link has been in progress (subsec. 5(b)).

This levy is made and this refund is to be given whether the village has or has not any county road extension or connection within its boundaries.

By subsec. 6 of sec. 28, this refund "shall be deemed to form part of the expenditure in carrying out a plan of highway improvement in the county for the purpose of ascertaining the amount of aid which may be granted to the county under this Act."

Treating the words "shall be deemed to form part of the expenditure," etc., in the same way as the words "deemed to include" were construed by Lord Buckmaster in *Rabett v. Commissioner of Stamp Duties*, [1929] A.C. 444, at p. 447, it will be clear that, while the refund so made by the county is destined to be spent by the village upon streets therein designated by the Min-

ister of Highways (subsec. 5(a)), and not upon the county highways, it is to be treated as if it were in fact spent on these county roads.

The rebate, as it occurs to me, is to recoup the village for a contribution which it is compelled to make to a county road scheme from which it gets no direct benefit, i.e., whether or not it has any county road extension or connection (sec. 5). But the amount the village pays under the annual levy is necessary to enable the county to finance its road improvement, while the withdrawal of the amount which the county has to pay to the village leaves it just so much short of the estimate of the amount required for its expenditure.

Pursuant therefore to the provision that the amount repaid is deemed to be part of its expenditure for which the county may claim a grant, the county is enabled to include it when a grant is asked for, and pursuant to sec. 17 of the Act is made, of one-half share of the whole expenditure, including this refund, which is by a legislative direction designated as being part of it.

I would, therefore, allow the appeal as proposed by my brother Middleton.

MULOCK, C.J.O., agreed with HODGINS, J.A.

MAGEE and GRANT, J.J.A., agreed with MIDDLETON, J.A.

Appeal allowed.

[APPELLATE DIVISION.]

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Sale of Goods—Conditional Sale of Specific Article—Repossession on Default—Provisions of Contract—Conditional Sales Act, R.S.O. 1927, ch. 165, sec. 7—Rescission of Contract—Inability to Return Article upon Payment in Full.

The effect of subsec. 1 coupled with subsec. 5 of sec. 7 of the Conditional Sales Act is to compel the seller, notwithstanding any agreement to the contrary, if he retakes possession of the goods for breach of condition, to retain them for 20 days, and it further confers upon the purchaser or his successor in interest the right to redeem the goods within that period by making certain payments. Subsection 2 (requiring notice to the purchaser) is applicable only in cases in which the seller intends to look to the purchaser for any deficiency on a resale of the goods.

Unless, therefore, he intends to call upon the purchaser to make good any deficiency upon a resale, if he retains the goods for 20 days,

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he may, unless they are redeemed, deal with them in any way not contrary to the provisions of the agreement between the parties or the general law—no express provision being made in the statute as to what is to happen after the 20 days.

The mere retaking of possession will not, without more, bring the contract to an end; if it is made clear that the seller's purpose in retaining possession is to hold the goods as security for the purchase-money, the contract will not be rescinded nor will the purchaser be released from his obligation to pay the purchase-price.

Sawyer v. Pringle (1891), 18 A.R. 218, except in so far as the law has since been changed by the Conditional Sales Act, applied.

The form of contract in these cases contained some apparently contradictory provisions; but explicitly provided that upon default the seller might retake possession of the goods, the property in which had always remained in it, and would so remain until payment of the purchase-price in full. The contract also provided that the retaking of possession should not affect the right of the seller to call upon the purchaser to pay the purchase-money; and the actions were in fact brought to recover the unpaid purchase-money.

But, as the plaintiff company was not shewn by the evidence adduced to be able, ready, and willing to deliver to the defendant in each case the goods which it had contracted to sell to him, and which it had repossessed upon default made by him, it was not entitled to recover, and the actions failed.

Maclean v. Dunn (1828), 6 L.J.O.S.C.P. 184, and *Crane v. Hoffman* (1916-17), 35 O.L.R. 412, 55 Can. S.C.R. 219, followed.

Per HODGINS, J.A.:—Remarks upon the effect which a resale may have in rescinding the contract, where reliance is placed upon the terms of the contract alone; and reference to *McEntire v. Crossley Bros.*, [1895] A.C. 457, and to sec. 46. of the Ontario Sale of Goods Act, R.S.O. 1927, ch. 163.

APPEALS by the plaintiff company from judgments of MAHON, Co. C.J., in the Seventh Division Court of the County of Essex, dismissing two actions brought to recover the amounts of two promissory notes given in respect of the purchase by each defendant of a radio upon a conditional sale contract.

December 9 and 10, 1930. The appeals were heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

W. J. Beaton, for the appellant company. The learned trial Judge erred in holding that there had been a rescission of the contract by the act of the appellant company in retaking possession without giving the statutory notice of resale. There is nothing in the Conditional Sales Act, R.S.O. 1927, ch. 165, dealing with the rescission of the contract by the act of retaking possession. Under the statute the vendor may repossess on default, or he may sue for the balance of the purchase-money, or he may do both. If he wishes to sue for the deficiency on a resale he must give notice. But there is nothing in the statute to prevent him repossessing and suing for the balance of the purchase-price, holding the article in the meantime as security to be handed over as soon as the balance is paid. Reference to *Sawyer v. Pringle*

(1891), 18 A.R. 218, 222; *Nichols & Shepard Co. v. Chamberlain*, [1918] 3 W.W.R. 308; *Harris v. Tong* (1930), 65 O.L.R. 133; Barron's Canadian Law of Conditional Sales, 3rd ed., p. 397. *National Trust Co. v. Larson*, [1929] 2 D.L.R. 863, is distinguishable.

H. S. Rosenberg, for the defendants, respondents. There is no mention in the evidence that the plaintiff company is holding the chattel for safekeeping nor as to where it was at the time of the trial. The statute must be interpreted as a whole as well as the contract between the parties. The seller has no greater rights in suing for the whole of the purchase-price than if he merely sues for the deficiency upon a resale. The respondents are entitled, without evidence as to the whereabouts of the chattel, to assume that it has been resold without notice. In order to succeed in an action for the balance of the purchase-price the vendor must hold himself ready to return the chattel upon payment: *Armstrong v. Larson* (1914), 30 W.L.R. 545. *Sawyer v. Pringle*, cited for the appellant company, is no longer law. The vendor must rely on the statute. He cannot sue for a deficiency until after a resale: *Harris v. Tong*, 65 O.L.R. 133; *Advance Rumely Thresher Co. v. Dankert and Sandidge* (1919), 50 D.L.R. 144; *National Trust Co. v. Larson*, [1929] 2 D.L.R. 863. The contract should be construed strictly against the appellant company who prepared it. If, as stated, the company seized under clause 8 of the contract, it is there provided that the payments made shall be retained as liquidated damages. The \$25 note is also a lien-note, and when the appellant company sues on both notes, there is nothing to shew on which he relies. The two notes cannot be differentiated. The respondents are entitled to draw the inference that the appellant company seized under both notes, i.e., under all the rights it had.

Beaton, in reply, referred to 2 C.E.D. (Ont.), p. 637; *C.C. Motor Sales Ltd. v. Chan*, [1926] S.C.R. 485; *Thomas Brooks & Son v. Drury* (1927), 60 O.L.R. 192.

January 12, 1931. GRANT, J.A.:—These are appeals from the judgment of Mahon, County Court Judge, in the Seventh Division Court, County of Essex, delivered on the 8th July, 1930, whereby he dismissed the plaintiff company's actions brought upon certain so-called promissory notes given in respect of the purchase by the defendants from the plaintiff company of certain radios, under conditional sales contracts. The actions bring in question the provisions of the Conditional Sales Act, being R.S.O. 1927, ch. 165.

The actions were based upon conditional sales contracts, simi-

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lar in form, and which, in so far as affects the present inquiry, are accompanied substantially by the same states of facts. No distinction was drawn between the two cases in the presentation of the appeals before us.

The ground upon which the plaintiff company's claim was dismissed in each case is thus expressed by the learned County Court Judge:—

"In my opinion repossession by the plaintiff company and its failure to give the statutory notice amount to a rescission of the contract, and of course prevent it from succeeding in these actions for the purchase-price as well as any deficiency should he resell. Even if I should be wrong in that, the plaintiff company is estopped or precluded from suing for the whole of the purchase-price or for a deficiency by reason of the retaking of possession and the failure to give the statutory notice of its intention to resell and to look to the vendee for the deficiency.

"It seems to me that the effect of the Act is this, that, where the vendor repossesses, his right to a personal judgment for the unpaid balance is at an end, unless he gives the notice of intention to sell and gives the vendee the opportunity to redeem as provided by the Act, and upon failure of redemption to resell, and if there is a deficiency to claim for that."

If the decision of the appeals rested upon the interpretation thus given by the learned County Court Judge, I would feel compelled to allow the appeals, as I am not able to give assent to the view thus expressed. I am of opinion that the language used is much wider in its effect than will be supported by the provisions of the statute and the law bearing upon its interpretation. The pertinent section of the Conditional Sales Act reads as follows:—

"7.—(1) Where the seller or lender retakes possession of the goods for breach of condition he shall retain them for twenty days, and the purchaser or hirer or his successor in interest may redeem the same within that period on payment of the amount then in arrear, together with interest and the actual costs and expenses of taking and keeping possession..

"(2) Where the purchase-price of the goods exceeds \$30, and the seller or lender intends to look to the purchaser or hirer for any deficiency on a resale of the goods, they shall not be resold until after notice in writing of the intended sale has been given to the purchaser or hirer or his successor in interest.

"(3) The notice shall be served personally upon or left at the residence or last known place of abode in Ontario of the purchaser or hirer or his successor in interest at least five days before the sale, or may be sent by registered post at least seven days before

the sale addressed to the purchaser or hirer or his successor in interest at his last known post-office address.

"(4) The notice may be given during the twenty days mentioned in subsection 1.

"(5) This section shall apply notwithstanding any agreement to the contrary."

The effect of subsec. 1, coupled with subsec. 5, is to compel the seller, notwithstanding any agreement to the contrary, if he retakes possession of the goods for breach of condition, to retain them for 20 days; and it further confers upon the purchaser or his successor in interest the right to redeem the goods within that period by making certain payments.

It is to be noted that subsec. 1 does not contain any provision as to the effect of the retaking of possession by the seller. Unless, therefore, it is altered by other provisions of this section or of the statute, the effect of the retaking of possession would remain as it would have been if the Act had not been passed; that is, as provided in the agreement of the parties in that regard (if any), and in the absence of such agreement then as by law determined.

Subsection 2 provides, in effect, that where the purchase-price exceeds \$30 and the seller intends to look to the purchaser for any deficiency on a resale of the goods, they shall not be resold until after notice in writing of the intended sale has been given to the purchaser or his successor in interest. It will be noted that this subsection is made applicable only to cases in which the seller "intends to look to the purchaser . . . for any deficiency on a resale of the goods," in which case "they shall not be resold until after notice in writing of the intended sale has been given . . ."

In other words, if it is not intended to effect a resale of the goods, or if, in case of resale, the seller does not intend to look to the purchaser for any deficiency resulting from the resale, the subsection has no application.

Subsections 3 and 4 deal only with the service of the notice, and subsection 5 makes the whole section applicable notwithstanding any agreement to the contrary.

As already observed, under subsec. 1, if the seller retakes possession, he must retain the goods for 20 days to permit of their redemption by the purchaser within that period as fixed by the statute. There is no provision, other than the one just noted, which affects the right of the seller to retake possession, or which affects his rights after possession retaken, except in the case specified by subsec. 2, namely, if the seller intends to look to the

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purchaser for any deficiency on a resale of the goods. As I read the statute, unless he intends to call upon the purchaser to make good any deficiency resulting from a resale, if he retains the goods for the statutory period of 20 days to permit of their redemption, as above mentioned, unless they are redeemed he may deal with them thereafter in any way not contrary to the provisions of the agreement between the parties or the general law. The provisions of the Conditional Sales Act do not affect the present cases in any other respect.

If default be made by the purchaser, and the seller, from whom the property in the goods has not passed, resumes possession thereof under the terms of his contract, the mere retaking of possession will not, without more, bring the contract to an end. The seller would have a perfect right to retake possession of the goods and to hold them safely as security for the purchase-money; and, if it was made clear that such was his purpose in retaining possession of the goods, the contract would not be rescinded nor would the purchaser be released from his obligation to pay the purchase-price.

"Where the contract contains this term as to resuming possession, we generally find this followed by a power given to the vendors to sell the chattel, either with or without notice, and to credit the proposed purchaser with the proceeds realised from the sale, leaving him expressly liable for any difference between that and the contract price.

"In such a case the contract would undoubtedly not be rescinded.

"If the plaintiffs here had merely exercised their right to resume possession and had then retained the machine ready for the defendant on full payment, it would also clearly remain in force" (Hagarty, C.J.O., in *Sawyer v. Pringle*, 18 A.R. 218, at p. 222).

"I do not agree with one of the learned Judges in the Divisional Court that the resuming possession, which by the very terms of the agreement was authorised, operated as a rescission of it, on the contrary, they were entitled both to hold that security and to enforce the notes" (*ibid.*, Burton, J.A., at p. 227).

In the same case, although he dissented from the judgment of the majority of the Court, MacLennan, J.A., expressly concurs in the above statement of the effect of such a contract, in the following words (at p. 233, where he was dealing with the parties' rights under the contract): "The purchaser was to have possession and right of user at once until any default in payment, but if any such default occurred the whole price was to fall due

and payable, and the plaintiffs might resume possession. That clearly contemplates that they could resume possession, and also proceed to recover the full price. The possession therefore was to be resumed for the protection and security of the plaintiffs, and to secure them in the only thing which concerned them, namely, the payment of the price agreed upon."

The statement contained in the first paragraph quoted above from the opinion of the late Chief Justice of Ontario is not now the law by reason of the provisions of the Conditional Sales Act, which, however, as already stated, has not altered the rights and position of the parties in the other respects dealt with by the opinions quoted.

The seller, therefore, having the right on default to retake possession of the chattel, without thereby necessarily rescinding the contract, we must turn to the agreement in the case at bar to ascertain what provision, if any, the parties have made to define their rights. The sale contract is embodied in a lengthy and somewhat involved printed document, and its interpretation, by reason of certain apparently contradictory provisions, might be attended with considerable difficulty. For example, in clause 8, after providing that upon default the seller may take immediate possession of the property, it goes on to state that upon repossession all rights of the purchaser in the property shall terminate absolutely, a provision which is in direct conflict with subsec. 1 of sec. 7 of the Conditional Sales Act. In clause 11 it provides that "repossession and retention, sale or right thereto, shall not affect the purchaser's liability until full payment has been made in cash or the seller's right to sue the purchaser at any time for any moneys due and payable . . ." It also states that the seller shall have the right to enforce one or more remedies successively or concurrently, and that such action shall not estop or prevent the seller from pursuing any further remedy which he may have.

The reconciliation of some of the provisions of this form of contract may involve the exercise of care and skill on the part of some court in some case; but, in the view which I hold of the cases now before us, this task does not now devolve upon us. It is sufficient to state that the contract between the parties explicitly provides that upon default the seller may retake possession of the goods, the property in which had always remained in the seller, and would so remain until payment of the purchase-price in full. So, also, does the contract provide that the retaking of possession shall not affect the right of the seller to call upon the purchaser to pay the purchase-money, which has been done

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App. Div. in the cases at bar. There remains, however, another, and in my
1931. opinion an insurmountable, obstacle in the way of the plaintiff
company's success.

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It is clear law that, as this was a conditional sale of a specific chattel, and the seller's obligation could be fulfilled, upon payment of the purchase-money, only by the delivery of the specific chattel agreed to be sold, the seller must be and continue able, ready, and willing to deliver possession of that chattel upon payment to him of the purchase-price, which is being demanded in these actions. When we come to examine the evidence bearing upon this feature of the matter, notwithstanding that the learned County Court Judge has made an express finding in the *De Wilde* case that the radio in question had not been sold or disposed of by the plaintiff company but was still in the company's possession, I find that the only evidence given by any witness upon the point was given by one Lambert, an official of the plaintiff company, and was quite insufficient. That testimony is to be found on p. 10 of the record, and reads as follows:—

“Q. Now, after this action was started the radio was repossessed, was not it? A. Yes, sir.

“Q. Where is it now? A. I believe it is in the store; *I would not want to say* until I have looked over the stock and got the number.”

As the witness “would not want to say” that the company still held the radio in its possession, it is manifest that this falls very far short of establishing that the plaintiff company was able as well as willing to deliver the specific article sold upon payment by the defendant of the purchase-price. That nothing less than this will suffice must be at once apparent, as the money sought to be recovered from the defendant is the purchase-price of the chattel, upon payment of which he would be entitled to delivery of the radio. Not only must the seller be, and continue, able as well as willing to deliver the chattel upon payment, but he is bound to keep it, while in his possession, in the same plight and condition as when it was repossessed by him. This was very plainly stated by Middleton, J.A. (then Middleton, J.), in *Crane v. Hoffman* (1916), 35 O.L.R. 412, at p. 414, which was affirmed in the Appellate Division as reported in the same volume. The seller's duty under such circumstances is very succinctly stated by Hodgins, J.A., in the report of the same case at p. 423: “Where the property has not passed, the owner must, if he take possession, retain the chattel so as to enable him to fulfil the contract.” This judgment was affirmed in the Supreme Court

of Canada (1917), 55 Can. S.C.R. 219, *vide* Anglin, J. (now Anglin, C.J.C.), at the bottom of p. 229 and p. 230.

As the plaintiff company is not shewn by the evidence adduced to be able, ready, and willing to deliver to the defendant in each case, the radio which it had contracted to sell to him, and which it had repossessed upon default made by the defendant, it is not entitled to recover payment from him of the unpaid purchase-money, and the actions brought with that object must fail.

The circumstances surrounding the cases are not such as to justify the Court, in the exercise of its discretion, in directing that there should be new trials to enable the plaintiff company to furnish the evidence, if it is able to do so, to supply what was lacking in the cases as placed before the Court.

In my opinion, therefore, the plaintiff company's appeals should be dismissed and with costs.

MULOCK, C.J.O., and MAGEE and MIDDLETON, JJ.A., agreed with GRANT, J.A.

HODGINS, J.A.:—In the case of *McEntire v. Crossley Bros.*, [1895] A.C. 457, Lord Herschell, at pp. 464 and 465, states the law with regard to the retaking of a machine, the property in which had not passed from the seller, on default in payment. The contract in the case was in the form of an agreement to hire a gas-engine at a rent to be paid by instalments; upon payment in full the agreement to be at an end and the engine to become the property of the lessee. It was also agreed that, in case of failure to pay any of the instalments, the lessors might elect either to recover the full balance remaining due or instead to resume possession of the engine and sell it, and, after retaining out of the purchase-money all expenses and the balance remaining due, pay the surplus, if any, to the lessee, provided that, if the lessors should see fit to resume possession of the engine without selling, the loss to them occasioned by the lessee's non-performance of the agreement should be borne by him or by his estate in case of bankruptcy.

Lord Herschell said:—

"On the resumption of possession they may pursue one of two alternative courses. They may, if they like, sell; and if they sell and if on the sale the engine produces more than enough to pay everything that would be due in any event to Messrs. Crossley, and leaves a surplus, then Messrs. Crossley undertake by the agreement to pay that surplus to Mr. Peel, the bankrupt. But that is not the only course which they may pursue. It is absolutely at their option whether they do that or not. They may

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1931. possession, they may sue the hirer, or whatever the bankrupt
MAXWELL should be called—I will call him the hirer to prevent using
RADIO CO. several words—for the damages they have sustained by the non-
LTD. performance of the provisions of this agreement; or if he becomes
DE WILDE. bankrupt they may prove for them as liquidated damages. Of
v. course, the distinction is as well settled as it possibly can be
Hodgins, between a debt for the price of goods the property in which has
J.A. passed, and an action of damages for breach of a contract to buy
and pay for the goods. In the former case, of course, the debt
due is the balance of the price, the purchaser keeping the goods.
In the other case the vendor retains possession of the goods; but
he sues for the damages that he has sustained by the purchaser
not carrying out his agreement to buy as stipulated. This agree-
ment provides that he may either sue for them if there has not
been a bankruptcy, or prove for them if there has been a bank-
ruptcy. But suing or proving for those damages implies of
course the property as well as the possession being still in the
vendor. So far from finding in this agreement anything that
runs counter to the expressed intention of the parties that the
property should throughout remain in the vendor, everything
to my mind seems to point in that direction.

“But it is to be observed that if he sells and the engine pro-
duces on the sale less than what would be due from Mr. Peel,
there is no provision that he can recover the balance. His only
course, if he contemplated such a result, would be to determine
not to sell, but to keep possession and to sue for damages for
breach of contract, or to prove for such damages.”

The Conditional Sales Act in this Province defines the rights
of the parties when the seller retakes possession of goods for a
breach of condition and requires such possession to be maintained
for 20 days to allow redemption. No express provision is made
for what is to happen after the 20 days, and so the rights of the
parties after that date would seem to be governed by the con-
tract. But, under the Conditional Sales Act, where the purchase-
price exceeds \$30, as in this case, if the seller intends to look to
the purchaser or hirer for any loss on a resale, then a prescribed
notice must be given before the sale takes place, and if this stipu-
lation is strictly carried out the purchaser or hirer becomes liable
for the loss, if any.

If this course is not taken and reliance is placed on the terms
of the contract alone, a point may arise in some future case such
as is mentioned by the learned author of the 6th edition (1920)
of Benjamin on Sale, in dealing with the statutory right to sell

contained in the English Sale of Goods Act (1894), 56 & 57 Vict. ch. 71, sec. 48, subsecs. 1, 2, 3, 4. At p. 1083 it is said of subsec. 3 that the remedy given by it is the recovery of damages for any loss; and the authors proceed thus, referring to what Lord Herschell said in *McEntire v. Crossley* (*ante*):—

“Now, in the construction of a contract of sale such a provision goes to shew an intention of the parties that the property in the goods should remain in the seller; and it may be that the similar enactment in the Code indicates an intention on the part of the Legislature that the seller should be entitled to resell the goods as owner. If this be the true construction a resale in exercise of a right, whether express or given by law, will then rescind the contract; the seller will resell as owner; he will not be able to sue for the price, but can recover damages for any loss occasioned by the buyer’s breach of contract. If on the resale there is a net profit, the seller is entitled to retain it.”

There is a similar provision in our Ontario Sale of Goods Act, R.S.O. 1927, ch. 163, sec. 46, and as the Conditional Sales Act makes no express declaration upon the point suggested it may be argued that without such express declaration the agreement of the parties may be ineffective to alter the legal consequences of the resale. The point may well be left for future consideration.

In this case, however, the action is for the full purchase-price, and there is no definite evidence as to the fate of the goods after repossession, whether sold, lost, or still in the possession of the plaintiff company. In *Maclean v. Dunn* (1828), 6 L.J.O.S.C.P. 184, a similar case, Best, C.J., said (p. 190):—

“It is clear, and must certainly be admitted, that, to entitle the vendor to recover against the purchaser the full amount of the price agreed to be paid for the articles in the first instance, he must shew that they continue in his possession ready to be delivered; not so where he sues for a breach of contract only. If he sues for damages . . . it is not necessary that he should maintain dominion over the goods: he merely alleges that a contract was entered into for the purchase of certain articles, that it has not been fulfilled, and that he has sustained damage in consequence.”*

This being an action, not for damages merely, but for the full value of the goods under the contract, and distinct and positive evidence that the plaintiff company still has the goods not being given, it cannot succeed. The notes arise out of the contract and their enforceability must be determined by the same principle.

* The latter part of the quotation is from the report of the case in 4 Bing. 722, at p. 727.

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I would therefore dismiss the plaintiff company's appeals with costs.

Appeals dismissed.

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REX v. McCrory.

REX v. EDDY.

Criminal Law—Bigamy—Proof of Former Marriage—Presumption of Death of First Wife of Man Married to Accused Woman—Honest Belief in Existence of Circumstances Making Second Marriage an Innocent Act—Reasonable Doubt.

In November, 1924, Margaret M. went through the form of marriage with D. and lived with him as his wife, in Ontario, until 1928, when they separated. In November, 1929, she went through the form of marriage with E., who then knew of her marriage with D. and that D. was still alive. Margaret M. and E. were both prosecuted for bigamy, under sec. 308 of the Criminal Code. The defence of each was that D. was a married man when he went through the form with M., in 1924, and that therefore her marriage with D. was invalid. In May, 1915, D. married Hilda R. In January, 1927, she left him and disappeared, and he had never since learned whether she was alive or dead. According to his evidence, she had been continuously absent for more than 7 years immediately preceding his marriage with Margaret M., and it was not proved that he knew that his first wife was alive at any time during those 7 years. The magistrate before whom the accused were tried and convicted accepted D.'s evidence, and found from it that the unexplained absence of D.'s first wife raised the presumption that she was dead when, in 1924, he married Margaret M. Upon appeals by the accused from their convictions:—

Held, by the majority of the Court, that, the Crown having proved the unexplained absence of D.'s first wife for 7 years immediately preceding his marriage with Margaret M., and the presumption that she was then dead arising and discharging the onus which was upon the Crown, it was for the accused to rebut it; that they had not done, and therefore were rightly convicted.

Per MAGEE, J.A. (dissenting):—The case was not even one of reasonable doubt, but of absence of proof or actual disproof by the prosecution; and the convictions, based on a mere presumption which did not arise upon the evidence should be quashed. As against Margaret M. it must be proved that before November, 1929, she was lawfully married, and as against E. that he knew that she was. In the face of the proof of the D. marriage in 1915, and the absence of proof of the death of Hilda R., neither case was proved.

In another aspect, if the accused honestly believed in the existence of circumstances which, if true, would make the alleged bigamous marriage an innocent act, that would be a defence. They both swore that they had such a belief, and at the least there would be such reasonable doubt on that branch that the convictions should be quashed.

APPEALS by the defendants from their convictions by the Police Magistrate for the Town of Collingwood, under sec. 308* of the Criminal Code, for bigamy.

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Eddy was convicted for having gone through a form of marriage with Margaret McCrory knowing that she was then a married woman; and Margaret McCrory was convicted for that, being a married woman, she had gone through a form of marriage with Eddy.

December 10, 1930. The appeals were heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, JJ.A.

B. J. Spencer Pitt, for the appellants. It is the duty of the Crown to prove that Margaret McCrory's marriage to one Dingman was a valid and subsisting marriage. There is no evidence that when she married Dingman, she knew that he was already married and that his wife was living. It was not until several years after her marriage with Dingman that she learned that his first wife was still living. If she, when she married Eddy, believed that her former marriage with Dingman was invalid, then she is not guilty of bigamy. And the same reasoning applies to the case of the appellant Eddy.

W. B. Common, for the Crown. Once the Crown proves two *primâ facie* marriages, the onus shifts to the accused to prove that the first marriage was invalid. At the end of 7 years there is no presumption of the continuance of life. The onus of proving death is on the accused: English & Empire Digest, vol. 15, pp. 739, 740, secs. 7990, 7991; *Regina v. Lumley* (1869), L.R. 1 C.C.R. 196; *Rex v. Wheat*, [1921] 2 K.B. 119; *Rex v. Brinkley*

* 308. Bigamy is

(a) the act of a person who, being married, goes through a form of marriage with any other person in any part of the world; or

(b) the act of a person who goes through a form of marriage in any part of the world with any person whom he or she knows to be married; or

(c) the act of a person who goes through a form of marriage with more than one person simultaneously, or on the same day.

2. The fact that the parties would, if unmarried, have been incompetent to contract marriage shall be no defence upon a prosecution for bigamy.

3. No one commits bigamy by going through a form of marriage

(a) if he or she in good faith and on reasonable grounds believes his wife or her husband to be dead; or

(b) if his wife or her husband has been continually absent for seven years then last past and he or she is not proved to have known that his wife or her husband was alive at any time during those seven years; or

(c) if he or she has been divorced from the bond of the first marriage; or

(d) if the former marriage has been declared void by a court of competent jurisdiction.

App. Div. (1907), 14 O.L.R. 434; *Regina v. Tolson* (1889), 23 Q.B.D. 168.
1931. The only evidence of the existence of Dingman's wife is the
statement of Dingman, which is of a very weak character. Un-
less the accused can bring themselves within clause (a), (b), or
v. (c) or subsec. 3 of sec. 308 of the Code, the convictions should
McCrory. stand. *Rex v. Haugen* (1923), 41 Can. Crim. Cas. 132, is against
my contention, but there the leading English case of *Rex v. Wheat*
was not referred to.

January 12, 1931. The judgment of the majority of the Court was read by MULOCH, C.J.O.:—These are appeals from the convictions of Margaret McCrory and Louis Eddy for bigamy, made by the Police Magistrate for the Town of Collingwood. By consent both cases were tried together.

The facts are as follows. On the 7th November, 1924, in the city of Toronto, the accused Margaret McCrory went through the form of marriage with one Arthur Russell Dingman and lived with him as his wife in Toronto until about the year 1928, when they separated.

On the 22nd November, 1929, the accused Margaret McCrory went through the form of marriage with Louis Eddy, he knowing, at the time, of her marriage with Dingman, and that Dingman was then alive.

The defence in each case was that Dingman was a married man and that his first wife was alive when he went through the form of marriage with the accused Margaret McCrory, in 1924, and that therefore her marriage to him was invalid.

On the 4th May, 1915, Dingman, in the city of Toronto, married one Hilda Gladys Reading, and they lived together in Toronto as man and wife until the 12th January, 1917. On that day she left him and disappeared and he has never since learned whether she is alive or dead. At the time of their marriage they were resident in Toronto and he has ever since resided there. Since she left him he has not seen or heard from or of her, either directly or indirectly, and he has had no knowledge or trace of her. So far as appears, her only relative residing in Toronto is a sister, who has had no information as to her sister since her disappearance in 1917.

In February or March, 1917, Dingman "advertised for her" in the *Toronto Telegram*, but received no response. Thus, according to his evidence, she had been continuously absent for more than 7 years immediately preceding his marriage with the accused Margaret McCrory on the 7th November, 1924, and it was not proved that he knew that his first wife was alive at any time during those 7 years.

Margaret McCrory swore that, after her marriage with Dingman, a "girl" told her that his first wife was alive, and she also swore that Dingman told her he knew she was alive. In finding each of the accused guilty of bigamy it is clear that the magistrate accepted Dingman's evidence and found from it that the unexplained absence of Dingman's first wife raised the presumption that she was dead when, in 1924, he married Margaret McCrory.

In an indictment for bigamy the prosecution must satisfy the jury that the first husband or wife, as the case may be, was alive at the date of the second marriage: *Rex v. Inhabitants of Twynning* (1819), 2 B. & Ald. 386, discussed and explained in *Lapsley v. Grierson* (1848), 1 H.L.C. 498; *Regina v. Lumley*, L.R. 1 C.C.R. 196. That onus was on the prosecution in the present cases. Whether a person was or was not alive at a particular date is a pure question of fact and may be established as may any other question of fact. Here the prosecution has shewn the unexplained absence of Dingman's first wife for 7 years immediately preceding his marriage with Margaret McCrory, and such absence, in the opinion of the learned magistrate, raised the presumption of law that the first wife was then dead: *Nepean v. Doe d. Knight* (1837), 2 M. & W. 894. Thus the presumption discharged the onus which was upon the Crown, and it was for the accused to rebut it. This they have not done, and I am of opinion that the learned magistrate rightly found both of them guilty of bigamy, and therefore these appeals should be dismissed.

MAGEE, J.A. (dissenting):—Louis Eddy appeals from his conviction on summary trial before the Police Magistrate at Collingwood on the 30th October, 1930, on the charge of having, on the 22nd November, 1929, at Collingwood, gone through a form of marriage with Margaret McCrory, knowing she was married.

Margaret McCrory also appeals from her conviction on the same date on the charge that she, Margaret McCrory, on the 22nd November, 1929, being a married woman, did go through a form of marriage with Louis Eddy.

The allegation of the prosecution is that she was on that date the wife of one Arthur Russell Dingman, to whom she was married on the 7th November, 1924. The evidence for the prosecution is that Dingman in 1915 had married one Hilda Gladys Reading, in Toronto, and lived with her till the 12th January, 1917, when, he says, she left him. He says he put an advertisement in the Toronto *Telegram* newspaper for one insertion in February, 1917. The nature of the advertisement does not appear. He says he has not heard of or seen her since she left him. There was no child of the marriage. He was asked:—

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"Between 1917 and the time you married this girl (McCrory) in 1924, did you see your wife? A. No. Q. Did you have any conversation with any one about your wife? A. No. I tried to locate her through her sister, but she knew nothing about her."

When this was or where or under what circumstances, or how, or what other relatives she had, does not further appear. The sister was not called, nor was any further evidence or suggestion given of any inquiry in any direction as to the wife. Nowhere does he say that he ever believed or now believes her to be dead. "Q. You still presume her dead? A. Yes. Q. And you think you are not a bigamist . . . ? A. We went under sec. 209 (?309) of the Criminal Code. No one commits bigamy by going through a form of marriage when he believes his wife is dead." He was asked: "When you were married to this young woman, were you married yourself? His answer was "Yes, I was." Q. You are a bigamist yourself? A. No, my first wife was presumed dead."

In 1920 or 1921, Dingman was employed at an hospital in Toronto, and there met the accused McCrory, whose "original maiden name" he says was Margaret Elizabeth McCrory. At the trial he gave his age as 35 and hers as 26. She said she was 24. In 1921 they were 9 years younger. They kept company, she knowing that he was a married man at that time, he says, and lived together as man and wife, and a son was born to them. It resulted in his losing his position "and her resigning." After that a woman's society intervened, and the head lady, he says, "had us both married." The marriage was at Toronto on the 7th November, 1924. He says that the Judge of the Juvenile Court presumed his wife Hilda was dead and told the lawyer to issue the licence in the usual way. Why he was consulted does not appear. After the marriage a daughter was born.

In November, 1928, trouble arose between the couple. He denies that she had a conversation with him about his first wife being alive. She says a girl pointed out to her in the street in Toronto a woman as being his first wife. She further swore that she told Dingman, and that he said he knew she (the first wife) was living and in Toronto, and he had seen her in the street in Toronto before, and she was being supported on the streets, and it made no difference whether she was living or not. He (or "we") started to quarrel, and he beat her. They agreed upon a separation, and Dingman says that about two weeks before the separation, and while "it was in the hands of the lawyer," he had come home and found Eddy there with his wife and called for the police and Eddy was put out. He says the trouble and separation arose through Eddy's attention to the wife.

Eddy swears that Dingman—whom he had known for about four years—told him his first wife was living, but it made no difference and he still had a claim upon her (the second wife), and he didn't want any nigger (Eddy) going with her.

She says that Dingman had taken his goods away from the house, and it was her house. She denies having relations with Eddy before the separation and denies having ever had improper relations with any one but Dingman and Eddy. However, the separation took place, she keeping the daughter, and she went to live with Eddy.

In February, 1929, Dingman instigated proceedings against them under sec. 215 of the Criminal Code, apparently for living immorally at a home in Toronto to the prejudice of a child's morals, and they were convicted in the Juvenile Court under the names of Margaret Dingman and Louis Eddy, and fined. She says the child in the house was not her child. Dingman also had an article about them published in a paper called "Hush," and sent a copy to her father with a letter stating that he was "still on the war-path for that negro that wrecked my home;" and "I will never give up till the authorities bring this black skunk to justice." These shew, perhaps, an animus which might be expected, but they also shew cause for scrutinising and weighing his evidence with care. However, on the 22nd November, 1929, under the names of Louis Eddy, age 25, and Margaret McCrory, age 23, spinster, those two were married at Collingwood. Eddy admits that he knew of her marriage to Dingman, but he thought it was illegal. She says she went to a lawyer who said if the (first) wife was living she (McCrory) was the same as single.

Now, this being the evidence, should the appellants have been convicted?

The first thing that strikes one is that the Crown in both cases has put it on record that it was Margaret McCrory and Louis Eddy who went through the form of marriage. If the Crown's case is otherwise proved, she was not Margaret McCrory but Margaret Dingman, so that on the face of the record she was unmarried.

But, aside from that, the conviction of a serious crime on this evidence seems to me very unfair. Considering Dingman's confessedly immoral relations for several years with a girl admittedly at least nine years younger than himself, and his expressed animus, apart from the danger of being himself found guilty of bigamy, his evidence as to his first wife's existence or non-existence should be received with great caution. It is difficult to believe that he never heard anything more of her. He evidently was unwilling to marry the McCrory girl until the head lady "had us both married," though living with her and having issue, and now resenting so

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much being deprived of her while saying he wants a divorce. That of itself would be at least compatible with knowledge in 1924 that he could not legally marry her. The convicting magistrate has not given his reasons for the conviction nor indicated whether, or how far, he disbelieved the evidence of the accused as to their information, or Dingman's admissions of knowledge of the first wife being still living and in Toronto. Further than has been mentioned Dingman did not expressly deny the admissions. The magistrate may have considered that because the evidence was not enough to convict Dingman of bigamy, therefore the marriage to McCrory must be considered valid.

Human life is presumed to continue for a reasonable, ordinary period, unless facts or inferences warrant a conclusion to the contrary. "The presumption of the duration of life of persons of whom no account can be given, generally ends at the expiration of 7 years from the time when they were last known to be living:" Roscoe's *Nisi Prius Evidence*, 19th ed., p. 38. After referring to persons shewn to have been in existence as long a time ago as 100 years, but "in shorter periods (as 50 years) inquiry must be made in proper quarters, and from persons likely to know, whether the missing party, A., has been heard of:" *ib.* Here there is an utter absence of proof of such inquiry, so no presumption of the first wife's death arises, and the Court is asked to send two persons to prison on the faith of such a presumption. If he had said he did not believe the evidence of the accused as to Dingman's admissions, the magistrate might have been entitled to act on such disbelief; and, even if he believed the admissions to have been made, that would not prove the first wife's existence, because the facts so admitted are not proved. But it is a question of the sufficiency of the proof of the death of the first wife because unless that is proved by inference or otherwise the accused cannot be convicted.

Section 308 of the Criminal Code deals with the crime of bigamy. Subsection 1(a) defines it as the act of a person who, being married, goes through a form of marriage with any other person, and (b) the act of a person who goes through a form of marriage with any person whom he knows to have been married. Therefore, as against McCrory, it must be proved that before the 22nd November, 1929, she was married, that is, lawfully married, and as against Eddy that he knew she was. In the face of the proof of the Dingman marriage of 1915, and the absence of proof of the death of that wife, neither case is proved.

Subsection 3 provides (a) that a person does not commit bigamy (a) if he or she in good faith and on reasonable grounds believes his wife or her husband to be dead. That provision exempts from criminal liability, but does not validate the second

marriage—and it does not apply here because it is not the death of Dingman which is in question. The same may be said of clause (b) as to cases where the wife or husband has been continually absent for 7 years and not known to have been alive. That subsection shews how careful the Legislature was to guard against imputing criminality.

In my view, the case is not even one of reasonable doubt, but of absence of proof or actually disproof by the prosecution; and the conviction should be quashed, based as it must be on a mere presumption which does not arise on the evidence and upon which alone the appellants have been sentenced.

Even if there were not such absence of proof, there is the other aspect of the case. Had the accused an honest belief in the existence of circumstances which, if true, would make the alleged bigamous marriage an innocent act? If they had, that would be a defence: *Rex v. Haugen*, 41 Can. Crim. Cas. 132; and see *Bank of New South Wales v. Piper*, [1897] A.C. 383, 389, 390. They both swear they had such a belief. It is difficult for me to believe that if they had not they would have gone through the form of marriage which theretofore they had found unnecessary. There would in any case be such reasonable doubt on that branch that the conviction should be quashed.

Appeals dismissed (MAGEE, J.A., dissenting).

[APPELLATE DIVISION.]

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Criminal Law—Procuring Money by False Pretences—Conviction—Criminal Code, sec. 405 (1)—Evidence of Transactions not Charged by Crown in Indictment—Admissibility—Relevancy—Unsuccessful Appeal—No Substantial Wrong or Miscarriage—Sec. 1014 (2) of Code—New Trial Denied.

The defendant was convicted, after trial in a County Court Judge's Criminal Court, upon a charge of having unlawfully with intent to defraud by false pretences procured \$1,200 from C. to be delivered to H. & H., contrary to sec. 405 (1) of the Criminal Code. The evidence shewed a scheme on the part of H. & H. in connection with subdivisions of lands. Individual lots in these subdivisions were conveyed to a number of individuals employed by H. & H. or with whom corrupt arrangements had been made. These conveyances were not the result of actual transactions but were put through for the purpose of giving an appearance of reality to subsequent fraudulent transactions. Upon a conveyance being made to one of these persons he executed a mortgage for a considerable sum, the land itself being of small value, and the mortgage was dealt with as though a building had been erected upon the land; and upon the representation that a building had actually been erected upon the

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land, and to lend colour to the representation, an insurance policy upon the mythical building was obtained and assigned as collateral to the mortgage, which was then sold to an unsuspecting victim. The defendant was solicitor for H. & H., and in most of these transactions the conveyancing was done by him. There was no direct proof that he knew of the fraudulent nature of the individual transactions, but he had frequently been upon the subdivisions, himself held some of the mortgages, and had transferred some to clients as investments. Upon each transaction which was put through by his instrumentality he received a substantial commission. The particular transaction in respect of which the defendant was convicted was with C., who, at the solicitation of the defendant, advanced \$1,200 upon a mortgage made to him, upon the faith of an assurance by the defendant that he had seen the property, that a substantial brick dwelling had been erected upon it, worth \$3,000 or \$4,000, and that it was a good security for the \$1,200. There was no building of any kind, and the property was not worth more than \$250. A transaction similar to that with C. took place with reference to the sale of a mortgage by the defendant to L., and the defendant was first tried on a charge of obtaining money from L. by false pretences, and was acquitted, the County Court Judge taking the view that the Crown had failed to shew a guilty intention—that what happened might have been a mere mistake on the defendant's part. By consent of counsel for the defendant, to avoid retaking the evidence on the L. charge, that evidence was admitted in the C. case as evidence, saving the defendant's right to object to its relevancy. The appeal from the conviction in the C. case was largely based upon the alleged irrelevancy of the evidence so admitted:—

Held, by the majority of the Court, on appeal from the conviction, that the evidence was admissible, not only for the purpose of rebutting the defence relied upon by the accused, viz., that that which took place was not the result of any criminal intention on his part, that it was mere innocent mistake, but also on the wider ground that it was open to the Crown to shew, for the purpose of establishing criminal intent, that what was done was in truth part of a larger fraudulent scheme and design to which the defendant and others were parties.

Makin v. Attorney-General for New South Wales, [1894] A.C. 57, and *Regina v. Ollis*, [1900] 2 Q.B. 758, followed.

No substantial wrong or injustice having occurred such as would warrant the ordering of a new trial (sec. 1014 (2) of the Code), the appeal was dismissed.

Per MULOCK, C.J.O., and GRANT, J.A., dissenting:—The evidence admitted was irrelevant; and, as it appeared that the irrelevant evidence influenced the County Court Judge adversely to the defendant, the conviction should be quashed and a new trial had.

AN appeal by the defendant from his conviction by CLEMENT, Co. C.J., in the County Court Judge's Criminal Court of the County of Perth, upon a charge of having, by false pretences, with intent to defraud, procured the sum of \$1,200 to be delivered by David Carson to Hubbs & Hubbs Ltd.

October 27, 28, 29, and 30, 1930. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A. R. S. Robertson, K.C., and J. W. Pickup, for the appellant,

argued, as to David Carson, that neither his evidence nor his memory was to be relied upon. Nor was there any evidence adduced upon which the learned County Court Judge could have properly found misrepresentation of fact by the appellant with intent to defraud. In regard to some of the mortgages, there was no evidence of any impropriety on the part of the appellant. As to some mortgages in York county, there was no evidence to connect the accused with them except that his name was typed on the back of them. Evidence was wrongly admitted, for example, evidence taken upon another charge, upon which he had been acquitted, was admitted. Reference to *Rex v. Baird* (1915), 11 Cr. App. R. 186; *Regina v. Ollis*, [1900] 2 Q.B. 758, at p. 775; *Regina v. Rhodes*, [1899] 1 Q.B. 77, at p. 82; *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57; *Rex v. Bond*, [1906] 2 K.B. 389; *Rex v. Welford* (1918), 42 O.L.R. 359; *Rex v. Gibson* (1913), 28 O.L.R. 525; *Rex v. Bailey*, [1924] 2 K.B. 300; *Rex v. Rodley*, [1913] 3 K.B. 468. The onus was on the Crown to shew that a jury could not have done otherwise than find the accused guilty: *Brooks v. The King*, [1927] S.C.R. 633.

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A. C. Heighington, K.C., and *I. A. Humphries*, K.C., for the Crown. There were numerous similar transactions in which it was proven that the appellant had acted fraudulently. The fact that he had knowledge of what he was doing in similar acts is evidence of the fact that he had knowledge in the case at bar. The accused had visited the property in question. He was well aware of the fact that there were 153 lots on plan C23, and that he had arranged 114 mortgages upon this particular tract of land. There were only 33 buildings on the whole plan. Therefore he knew or ought to have known that many of the lots upon which substantial mortgages existed were nothing but vacant land. In numerous cases the mortgagor was a nominee of Hubbs & Hubbs Ltd., and was usually a person who had no financial means. In some instances one of these nominee mortgagors acted as the mortgagor in 20 or 30 different mortgages. This fact should have aroused the suspicion of the appellant. Evidence of subsequent transactions is admissible: *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57. Evidence of similar acts is admissible to prove knowledge: *Rex v. Bond*, [1906] 2 K.B. 389; *Rex v. Wyatt*, [1904] 1 K.B. 188; *Brunet v. The King* (1918), 57 Can. S.C.R. 83, at pp. 85 and 101; *Rex v. Howes* (1914), 23 Can. Crim. Cas. 358; *Rex v. Pollard and Tinsley* (1909), 19 O.L.R. 96. Evidence of similar acts is admissible to rebut evidence of mistake and to prove the intent of the prisoner: *Blake v. Albion Life Assurance Society* (1878), 4 C.P.D. 94. Evidence of similar acts is admissible to prove the absence of an innocent mind: *Regina v. Ollis*, [1900] 2

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Q.B. 758. The Crown was entitled to give evidence proving that the appellant had knowledge that there were no houses on certain lots, as the defence of innocent misrepresentation had been anticipated.

Robertson, K.C., in reply. The fact that a number of the mortgagors were nominee mortgagors was not enough in itself to arouse the suspicion of the appellant. Many of these mortgagors were old clients of Hubbs and were perfectly reliable. The accused did not know that these nominee mortgagors had no interest in the property. Most of the transactions mentioned by the Crown are not similar incidents, and therefore are not admissible as evidence. Although the appellant inspected the property in 1926, this cannot be considered as "knowledge of his," that there was or was not a house on a particular lot in 1929. Subsequent transactions are not admissible as evidence to prove knowledge. The appellant held, in his own name, mortgages on vacant property, as well as mortgages on land upon which houses were built. In some instances he assigned the valuable mortgages, and kept the worthless mortgages for himself. This raises a strong presumption that he did not know that there were not houses on all of these lots and that he was deceived by Hubbs.

January 12, 1931. MIDDLETON, J.A.:—In my opinion this appeal fails and should be dismissed.

The only ground upon which the case calls for any consideration is the alleged improper admission of evidence. The rule invoked was laid down by the Privy Council in the case of *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57, at p. 65:—

"It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

Accepting this rule to the fullest extent, I am of opinion that the evidence is admissible, not only for the purpose of rebutting the defence relied upon by the accused that that which took place was not the result of any criminal intent on his part but was mere

innocent mistake, but also on the wider ground that it was open to the Crown to shew, for the purpose of establishing criminal intent, that that which was done as constituting the particular offence for which the presumption is had was in truth part of a larger fraudulent scheme and design to which the accused and others were parties.

To appreciate what is meant by this it is necessary shortly to outline the facts leading up to the prosecution. There is no doubt upon the evidence that there was a far-reaching scheme, upon the part of individuals referred to in the evidence as Hubbs & Hubbs, in connection with the subdivision of lands near the Hamilton highway. Individual lots in these subdivisions were conveyed to a number of individuals in the employ of Hubbs & Hubbs or with whom corrupt arrangements had been made. These conveyances were not the result of actual transactions but were purely fictitious and put through for the purpose of enabling an appearance of reality to be given to subsequent fraudulent transactions. These individual lots had very small value, approximately \$200. Upon the conveyance being made, the stool-pigeon executed a mortgage for a considerable sum, \$1,000, \$1,200, and \$1,500, and these mortgages were dealt with as though buildings had been erected upon the lots, and, upon the representation that buildings had in fact been erected and to lend colour to these representations, insurance policies were issued upon these mythical buildings and assigned as collateral to the mortgage. These policies were issued by an insurance company for which Hubbs & Hubbs were agents. The mortgages were then sold to unsuspecting victims as mortgages upon actually existing houses and as excellent security.

Hamilton, the accused, was solicitor for Hubbs & Hubbs, and most of these transactions were carried out, so far as the conveying is concerned, by him. He was familiar with Hubbs & Hubbs and their transactions. There is no direct proof that he knew of the fraudulent nature of the individual transactions, but he had frequently been upon the land in question, and it is suggested that he must have known that many of the lots, at any rate, upon which substantial mortgages existed were in truth nothing but vacant land.

Hamilton himself held some of these mortgages. Some of these mortgages he had transferred to clients as investments. Upon each transaction which was put through by his instrumentality he received a substantial commission, in all over \$30,000.

The particular transaction giving rise to this prosecution is this: Hamilton, having learned that a man of his acquaintance named Carson had some money on hand, wrote him suggesting that he, Hamilton, could procure for him a secure investment.

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App. Div. Carson's daughter replied for him that he, Carson, would call upon
1931. Hamilton in the near future. Without waiting for any instructions, Hamilton wrote to Hubbs to take a mortgage in Carson's name and he would procure the money. Hamilton then wrote
REX Carson telling him that he had taken the mortgage in his name
v. and asking him to call and hand over the money. Carson called
HAMILTON. upon Hamilton and was reluctant to pay over what was to him a
Middleton, large sum of money without some assurance as to the validity and
J.A. sufficiency of the security. We have only Carson's version of what took place but his evidence was believed by the trial Judge. Carson says that Hamilton assured him that he had within a few days seen the property and that there was erected upon it a substantial brick dwelling house worth \$3,000 or \$4,000 and that it was a good security for the \$1,200 to be advanced. On the faith of this Carson paid over the \$1,200 and received a mortgage. There was no house or building of any kind, and the property was not worth more than \$250.

Hamilton gave no evidence on his own behalf and contented himself with arguing that all that had been shewn by the Crown was quite consistent with an innocent mistake on his part and that the presumption of innocence had not been rebutted by the facts disclosed.

There were many transactions of a similar character. Many of these fraudulent mortgages had been prepared. Some of these had been passed on to innocent victims, others existed and had not been disposed of when the Crown intervened and the business of Hubbs & Hubbs came to an end.

As stated by counsel for the accused, the question at the trial really resolved itself into this: Was Hamilton himself an innocent victim of the frauds of Hubbs & Hubbs or an innocent tool used by them in the carrying out of their schemes, or was he a willing agent and party to the whole fraudulent scheme?

The investigation at the trial took a very wide range. The number of conveyances of the character described was shewn; the number of mortgages of the character described was shewn; and the fate of these mortgages, as far as they had been dealt with, was also elaborated.

A transaction very similar to that outlined as having here taken place took place with reference to the sale of a mortgage by Hamilton to one Long. This charge was first investigated before the learned Judge, and the investigation resulted in an acquittal, the learned Judge taking the view that the Crown had failed to bring home guilty intention to Hamilton. All might have been an unfortunate accident, a mere mistake on Hamilton's part. By consent of counsel for the accused, to avoid retaking the evidence

on this charge, counsel agreed that the evidence should be put in in this case as evidence, saving his right to object to the relevancy. This appeal, as I have already indicated, is largely based upon the alleged irrelevancy of the evidence so put in.

The adoption of any such course at the trial, it appears to me, can only lead to a great deal of confusion, and, if any difficulty results from this wholesale admission of evidence, the accused cannot complain, as it was done with the consent of his counsel.

The admission of such evidence has been the subject of much discussion since the *Makin* case, and I suppose that it would be accurate to say that at the present time the most authoritative decision is that of *Regina v. Ollis*, [1900] 2 Q.B. 758. The defendant was there indicted for obtaining sums of money from three persons on three cheques which turned out to be no good. He had been previously tried for obtaining money upon another cheque. Upon this first trial he had been acquitted. Upon the second trial, for the purpose of proving guilty knowledge, the prosecutor in the first case was called and gave the same evidence as he had given in the first case. The defendant was convicted, and upon an appeal being had upon the question of the admissibility of his evidence, the Court of Criminal Appeal, Lord Russell of Killowen, C.J., Mathew, Grantham, Wright, Darling, and Channell, JJ. (Bruce and Ridley, JJ., dissenting) held that the evidence was properly admissible for the purpose of proving guilty knowledge. It was also argued that this was in fact subjecting the accused to a second trial with respect to the same offence.

I select from this case a passage in the judgment of Channell, J., at p. 781:—

“Where the proof of an offence involves the proof of such matters as intent to defraud, or guilty knowledge, or the like, the evidence of other transactions is often the only evidence by which that essential part of the offence can be proved. If the transaction is an isolated one a jury would seldom be satisfied of the prisoner’s guilt. A charge of embezzlement, founded on a failure to account for one sum out of many, would generally fail, and a charge of uttering counterfeit coin founded on the passing of one coin, with no proof of the possession by the prisoner at any time of other counterfeit coins, would generally fail also. In such cases evidence of other transactions is admitted, not for the purpose of shewing that the prisoner committed other offences, but for the purpose of shewing that the transaction the subject of the indictment was done with the intent to defraud, or with guilty knowledge, as the case may be. Such evidence is admitted, not because it tends to shew that other offences had been committed, but notwithstanding that, in the particular case, it may

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App. Div. happen to do so. . . . Suppose a man passes a counterfeit half-
 1931. crown, and on his trial, there being no proof of his having possession of any other counterfeit crowns, the jury acquit. It is subsequently discovered that either before or after the passing of the one half-crown (in my opinion it matters not which) he has passed another counterfeit half-crown, and upon comparison of the two base coins they appear cast in the same mould. If tried for the secondly discovered case of uttering, the fact of the other uttering would be most cogent evidence, and the fact that when that other case was supposed to be an isolated one a jury had acquitted would neither detract from the weight of the evidence nor in any way affects its admissibility."

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Rex v. Wyatt, [1904] 1 K.B. 188, is also of importance, as evidence was there admitted of similar acts committed by the defendant as tending to establish a systematic course of conduct and as negating any accident or mistake or the existence of any reasonable or honest motive on his part.

The case of *Regina v. Rhodes*, [1899] 1 Q.B. 77, is cogent. There the accused was charged with obtaining property by false pretences. Evidence of similar fraudulent transactions was admitted for the purpose of shewing that the accused "was not carrying on a real business" but that the business in which he was engaged was from first to last "a bogus or sham business." If the prosecution merely alleged isolated transactions of a fraudulent character against the prisoner with no connection between them, the evidence was not admissible. But, there being a nexus established, it being shewn that these transactions were all connected with and formed part of one scheme to defraud, the evidence was admissible.

There are other cases to the same effect, but these serve to illustrate the principle that in my view makes this evidence admissible.

Even if the evidence should have been found not to be admissible, I should have been very slow to yield to an application for a new trial. Upon the evidence accepted by the trial Judge as credible, the guilt of the accused seems clearly proven, and there is no evidence to the contrary, as the prisoner himself did not choose to deny his guilt. Had the case been tried by a jury, a comment on the failure of the accused to give evidence on his own behalf would have been improper, but I can see no reason why this should not be a factor to be considered when an appellate court is considering whether there has been in truth any miscarriage of justice.

MAGEE, J.A.:—The nature of this appeal and of the questions

involved are very fully dealt with by my Lord the Chief Justice and by my brother Middleton with whose reasons and conclusions I agree. The charge-sheet against the appellant included 14 counts, upon all which he was arraigned at one time, and to all he pleaded not guilty. They all charged false pretences and intent to defraud in obtaining from or procuring to be paid by 5 persons 7 different sums of \$1,200—and one of \$1,250—beside 4 sums of \$80—which were in effect part of 4 of the larger amounts. The first 6 counts related to moneys of William Long. The 7th and 8th counts to moneys of David Carson, \$1,200 and \$80. The other 6 counts related to 3 sums of \$1,200, moneys of three other persons. The Long charges were first taken up and many witnesses called and many exhibits filed. It was recognised by both sides that much of the evidence, if admissible, would be offered by the Crown in relation to more than one of the sums and their owners; and, while the defence retained its right of objection in each case, there was an endeavour on the part of counsel to save time and avoid recalling of witnesses and repetition of evidence. It was at the instance of the defence that charges as to the different persons were dealt with separately. Upon the Long charges the appellant was acquitted—and then the Carson case, the subject of this appeal, was taken up—and the Crown specified the witnesses on the Long case whose evidence already given it was intended to use as arranged without recalling them. Of the existence of the fraudulent scheme by Hubbs & Hubbs to make pretended sales to pretended purchasers and disposing of mortgages from them for far more than the value of the land, and this by the aid of insurance policies upon non-existent buildings, there can be no doubt. The case for the Crown was that Hamilton was a party to that scheme in assisting them to find persons who could be induced to take such mortgages. In the case of Carson his evidence shewed the direct statement by Hamilton as to the house being on the land to his knowledge, and there was the necessary insurance policy upon the imaginary building. The Crown could not know that the accused would not go into the witness-box to assert his innocence, and so counsel had prudently to offer evidence to rebut any suggestion of mistake or oversight or innocent belief. One singular fact was that the cheques for the appellant's commission on the Carson and other mortgage transactions during two months were not made out in his favour, though the payee endorsed one of them to him. But it was important to shew that the accused must have known that policies upon non-existing buildings were issued payable to mortgagees in other cases as well as this. The propriety of admitting evidence of *res inter alios acta*, whether prior or subsequent, to prove knowledge, intent, malice, or system, or to rebut accident or mis-

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App. Div. take, is recognised: *Rex v. Bond*, [1906] 2 K.B. 389; *Regina v.*
 1931. *Ollis*, [1900] 2 Q.B. 758; *Rex v. Smith* (1905), 92 L.T.R. 208;
 ——— *Rex v. Armstrong* (1922), 38 Times L.R. 631, [1922] 2 K.B. 555;
 REX *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57.
 v.
 HAMILTON. The mere fact that the evidence, if relevant, tends also to prove
 Magee, J.A. other offences is no ground for rejecting it: *Rex v. Ball*, [1911]
 A.C. 47. It may be that in the large amount of evidence introduced some facts were proved which in the result had no bearing upon the issue, but such instances worked no prejudice to the accused, but would really operate in his favour where nothing was proved against him. There is no hint in the reasons given by the learned trial Judge that he was influenced against the accused by any such evidence, and his decision on the Long charges would indicate that it did not weigh with him adversely to the defence.

It cannot, in my view, be said that any substantial wrong or miscarriage of justice has occurred to prevent the application of sec. 1014(2) of the Criminal Code. Therefore I would dismiss the appeal.

HODGINS, J.A., agreed with MIDDLETON, J.A.

MULOCK, C.J.O. (dissenting):—The accused was convicted by his Honour Judge Clement, in the County Court Judge's Criminal Court, of having, in the month of October, 1928, by false pretences, with intent to defraud, procured the sum of \$1,200 to be delivered by David Carson to Hubbs & Hubbs Limited. From this conviction the accused appeals, on the grounds, amongst other grounds, that it was contrary to law and that evidence was wrongfully admitted.

The following is the transaction out of which the charge arises:—

Ellen MacDonald made a mortgage, dated the 8th day of October, 1928, to David Carson, to secure the sum of \$1,200 with interest at 7 per cent. per annum on the south half of lot number 20 according to plan number D23 registered in the registry office of the county of Peel. Although the mortgaged property was vested in her, she had no beneficial interest in it, the real owner being Hubbs & Hubbs Limited, a company which for several years had been carrying on the business of acquiring blocks of land in the vicinity of what is called the Highway, running between Hamilton and Toronto, subdividing them into lots and selling the lots or raising the money upon them by mortgage. For some years the accused, a solicitor practising in Listowel, had acted as the agent of Hubbs & Hubbs in Listowel, and had induced many persons to lend money on the security of such mortgages, one of them being that in question.

It is charged that, in order to induce Carson to make the loan of \$1,200 upon the MacDonald mortgage, the accused had represented to him that there was a house upon the mortgaged property, that he himself had seen it, and that the mortgaged property was good security for the \$1,200; that Carson, relying on such representation, made the loan, and subsequently learned, as the fact is, that there was no house upon the property; that it was vacant land and wholly inadequate security for the loan.

Included in the charge-sheet were other charges against the accused, one being that of having by false pretences defrauded one William Long of \$1,250. The accused was first tried on the Long charge and was acquitted. The trial on the Carson charge was then proceeded with, counsel for the Crown and the accused agreeing in writing that "all the evidence given in the Long case (charge number 1 on the charge-sheet) except that of David Carson and except exhibits put in during the course of his evidence, should be taken as given in the trial of the accused on charges 7 and 8, the David Carson charges, and this subject to and reserving all objections and just exceptions. This is subject to the right of either party to recall any of the witnesses for further examination and cross-examination." Thus, evidence taken in the Long trial became evidence in the Carson case, which is number 7 in the charge-sheet.

Carson gave evidence. His recollection of what the accused told him in respect of the property covered by the MacDonald mortgage, and which he swore induced him to advance the \$1,200, was vague and uncertain, but the learned trial Judge accepted his evidence to the effect that on the 11th October, 1928, he had a conversation with the accused at which the latter made the representations to him which induced him to make the advance, and that these representations were in substance to the following effect: that the accused had been down the day before and had seen this house and that it was a good house, therein referring to the house built on the land included in the mortgage, exhibit No. 93, which was the subject of the conversation between them that day at the post-office.

The learned trial Judge also found that the accused represented to Carson that the MacDonald mortgage was "on the Highway but that subdivision D23 was more than half a mile north of the Highway," and he observes: "Therefore the representations of the accused to Carson were false unless in fact the accused was down there as stated and actually made a mistake in the location of the house he saw;" and then he proceeds: "It therefore becomes necessary to find as a fact what was the state of mind of the accused when he made those representations. For that purpose it is in my

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opinion proper to consider, not merely the evidence of similar representations of fact, but rather the whole picture as painted by the evidence. Much as the various items of evidence adduced by the Crown might vary in their respective weight and importance, each seemed to me to have its place in the picture, which I think must be considered as a whole if one is to arrive at a correct appreciation of the state of mind of the accused, and therefore should be considered on the principles laid down by the authorities cited by counsel for the Crown."

The learned trial Judge then proceeds to consider the items of evidence "in the picture," and so aided finds that on the 11th October, 1928, the accused knew that this mortgage was on vacant land; that the representation of the accused to Carson as to the house was false and made with intent to defraud; and therefore he found him guilty upon the charge.

The learned trial Judge was evidently of the opinion that the misstatement of the accused that on the occasion of his visit to the mortgaged property he had seen a house upon it was capable of an honest explanation, as, for example, a mistake as to the lot upon which he may have seen the house, and that therefore in order to find him guilty of the offence charged it was necessary to shew that he had guilty knowledge of the incorrectness of his statement that there was a house upon the mortgage lands. I agree with this view, and the question is whether in reaching his conclusion of guilt the learned Judge may have been influenced by irrelevant evidence.

In discussing "items of evidence in the picture" tending to shew guilty knowledge, the learned trial Judge observes "that in 1923 or 1924 the accused said in the presence of Mr. Spotton that he had never put a mortgage on for a client until he had first seen the house and knew that the real value was there." And then the learned Judge points out that the accused had mortgage transactions on lots in subdivision D23, commencing in 1923, either personally or as solicitor for clients "put through," what are in the evidence called "vacant mortgages," that is mortgages on vacant lands, namely, "in 1924, eight mortgages, of which four were vacant; in 1925 fourteen, of which seven were vacant, in 1926, twenty-one, of which nineteen were vacant, and from September 26 to October 8, 1928, twenty-one vacant, and as to the other subdivisions a more or less similar story is disclosed by the evidence."

I fail to understand upon what ground any of the foregoing items of evidence found "in the picture" are admissible against the accused. In my opinion none of them tend to prove that the accused committed the offence charged against him, and therefore their admission as evidence offends the general rule that evidence

not relevant to the charge is inadmissible: *Rex v. Thompson*, App. Div. [1917] 2 K.B. 630.

The practice of the accused in 1924 in not then taking mortgages on vacant lots does not tend to prove guilty knowledge on his part in connection with the transaction with Carson in 1928. An inference of intention to defraud Carson in 1928 cannot be drawn from the fact that the practice of the accused some years before was not to invest his clients' moneys on what are called "vacant mortgages."

Further, the learned trial Judge observes that from 1923 to 1928 the accused, for himself or his clients, was concerned in 94 mortgages, 51 of which were upon vacant lands. These transactions do not in my opinion tend to prove guilty knowledge of the accused in respect of the Carson transaction of October, 1928. From all that appears they were all honest transactions. Where, as here, the gist of the offence charged is fraud, the question of intent is material, and evidence of similar offences may be admissible as tending to shew intent, but an honest transaction is not similar to a dishonest one, and is therefore inadmissible as proof of criminal intent; if it tends to shew anything, it would be innocence: *Rex v. Simmonds* (1909), 2 Cr. App. R. 303; *Regina v. Francis* (1874), L.R. 2 C.C.R. 128. If the similar transactions do not amount to criminal offences they cannot be given in evidence: *Rex v. Baird* (1915), 25 Cox C.C. 86; *Rex v. Rodley*, [1913] 3 K.B. 468.

The learned trial Judge also refers to another item of evidence "in the picture" in these words: "As to other subdivisions, a more or less similar story is disclosed by the evidence." The evidence referred to covers over 2,000 pages and deals with several hundred mortgage transactions, in many of which the accused was concerned, but the vagueness of the learned trial Judge's reference to that evidence makes it impossible for an appellate court to determine what particular acts he refers to, and the only conclusion to be drawn from his reference to it is that it influenced him adversely to the accused. In fairness to an accused person, a trial Judge, in setting forth the evidence upon which he finds guilt, should do so with such clearness as will enable an appellate court judicially to review his finding; if this is not done (and it was not done here), and if the court thinks he may have been influenced by irrelevant evidence, the conviction should be set aside.

In the case of trial by jury, if inadmissible evidence is left to the jury and they find the accused guilty, the conviction is bad, although there was other evidence before them sufficient to warrant a conviction: *Regina v. Gibson* (1887), 18 Q.B.D. 537; and the

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same rule applies here unless the Judge makes it clear that he has disregarded it.

The learned trial Judge rightly held that the misstatement by the accused that to his knowledge there was a house on the mortgaged land did not *per se* prove a fraudulent intent, and that the onus was on the Crown to prove such an intent, and only after the admission of such irrelevant evidence did he find the accused guilty.

The reasons of the learned trial Judge for his judgment make it clear that irrelevant evidence influenced him adversely to the accused; and, therefore, the conviction should be quashed and a new trial had.

GRANT, J.A. (dissenting):—Having been afforded an opportunity of reading the opinion expressed by my Lord the Chief Justice of Ontario in this matter, I agree with him that this conviction ought to be set aside upon the ground of the improper admission of evidence which was not relevant to the issue. I desire as briefly as possible to state why, in my opinion, certain of the evidence admitted by the learned trial Judge is not relevant to the issue and therefore should not have been admitted.

The learned trial Judge mentions in his reasons for judgment that the accused had put through mortgage transactions on certain properties which were referred to as “vacant” (which was understood to mean lands without buildings upon them): in 1924, 4 out of a total of 8 mortgages; in 1925, 7 out of a total of 14 mortgages; in 1926, 19 out of 21 mortgages; and subsequently up to October, 1928, a further 21 mortgages; that the above were stated to have been confined to subdivision D23, and he states that the facts were similar regarding other subdivisions.

At another point in his reasons for judgment he states that from the years 1923 to 1928, the accused, for himself or his clients, had to do with some 94 mortgages, of which 51 were upon vacant lands.

In a mere handful of the above cases or transactions was there any evidence attempted to be adduced of any representations alleged to have been made by the accused, and, so far as my memory serves me, in none of them was there any reasonably satisfactory evidence given of any misrepresentation. However that may be, and even though it be conceded that with regard to a few of the transactions there was satisfactory evidence given of false representations knowingly made by the accused, and that therefore these were “similar cases,” the evidence respecting which would be relevant to the issue before the Court—on the other hand, in the vast majority of the cases no evidence of any kind was given as to

any representations, true or false, and I do not know any authority by which evidence regarding such transactions could possibly be admissible.

The charge upon which the accused was found guilty was that he did "unlawfully with intent to defraud by false pretences procure \$1,200 from David Carson to be delivered to Hubbs & Hubbs, contrary to Code, section 405(1)."

The gist of the offence is that the accused knowingly by false pretences procured the money. The misrepresentations which were found by the trial Judge to have been knowingly made, and therefore to have constituted "false pretences" were: (1) that there was a house on the mortgaged premises; (2) that he had seen it himself; (3) that the property was good security for the \$1,200.

The issue, therefore, as to which evidence might be admitted, if relevant, was, whether or not the accused knowingly made these false statements, and thereby procured the money from the complainant. The three essential elements were (1) the misrepresentations, (2) made with knowledge, and (3) thereby procuring the money. In my understanding of the law, "similar acts" must be those in which the actions and conduct of the accused were similar to those established by the evidence in the case before the Court, in all material particulars, the one factor remaining to be established being the state of mind and intent on the part of the accused. In other words, in the case of a charge of false pretences such as the present, it would be necessary, in order to constitute another transaction a "similar act," that there should have been not merely the placing of a mortgage on so-called vacant lands, but also the making by the accused of misrepresentations with regard to it whereby the advance of moneys was procured. It might not be necessary, in such a case, to prove, to the satisfaction of the Court, the state of mind or intent, although, from some of the authorities, that also would appear to be essential. Whether that be so or not, and I do not express any definite opinion upon it, this much appears to be well settled, namely, that it must be shewn that the acts and conduct were "similar." As was stated by the Lord Chancellor in *Makin v. Attorney-General for New South Wales*, [1894] A.C. at p. 65:—

"It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to

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an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were *designed or accidental*, or to rebut a defence which would otherwise be open to the accused."

In numerous cases it is made clear that evidence of "similar acts" is relevant to the issue only if it tends to establish the guilt of the accused. As was stated by A. T. Lawrence, J., in the *Bond* case, [1906] 2 K.B. 389, at p. 421:—

"If the act charged is manifestly an intentional act, but the defence is that it was honestly or properly done, such evidence (that is as to 'similar acts') is admissible to rebut this defence, by shewing knowledge of some fact essential to guilty knowledge or by shewing that in other cases similar acts have been committed by the prisoner by the like means under the like circumstances."

In a charge of false pretences, like the present, the false representations form the very foundation of the charge. If there were no representations of any kind, either true or false, there could not possibly have been constituted the crime of "false pretences," and the acts of which the evidence is sought to be given would not be "similar" in the sense contemplated by the authorities. The reason for the admission of the evidence is to rebut a defence of mistake or absence of intention. Evidence of transactions in which the accused made similar representations might be admissible, but I cannot understand upon what principle, or by what authority, the evidence could be relevant to the issue in a charge of false pretences, where it was sought merely to establish that the accused had put other mortgages on other vacant lands, but without any representation of any kind with respect to them. I cannot see how such evidence could possibly tend to prove that when, in this case, the accused represented that there was a house on the land, he knew that there was not; and that is at the very foundation of the charge of false pretences. To my mind such evidence is not admissible at all; it does not tend to support the charge made against the accused, nor to prove the issue, and cannot therefore be relevant to it. The putting on of the mortgage, and the obtaining of the money, and the fact that the land was vacant, these were all admitted, and were not in issue; what was in issue was the state of mind of the accused, his knowledge of the falsity of his representation, his intent to defraud. The evidence to which I have referred is, in my opinion, absolutely irrelevant and inadmissible, and has not, as I view it, any bearing whatsoever upon the issue, that is the thing to be proven. In my judgment, in order to constitute "similar acts," within principle and authority, the state of facts must be so similar that but for the defence of mistake or absence of wrongful intent, the criminal offence would be constituted. The accused must be so

placed by the state of facts in the "similar act" that he has to ask the Court to believe that he made an honest mistake in that case also, as well as in the case at bar. When this happens in a number of such cases within a reasonable time of one another, the law says in effect that, although it is credible that he might make a mistake once and make it honestly, yet belief in his honesty becomes more difficult with each repetition of the so-called mistake. The above appears to me to be in accord with what was stated by A. T. Lawrence, J., in the *Bond* case, above mentioned (p. 420):—

"The relevance depends upon the issues actually in contest; whenever it is in issue whether the prisoner, though he did the act alleged, did it without any intention, i.e., accidentally, or without any criminal intention, i.e., innocently, such evidence may be given."

As the matter presents itself to my mind, the accused in the case at bar might have placed 1,000 mortgages on vacant lands, and if he made no representations with regard to them which were found to be untrue, evidence regarding such transactions could not by any possibility be relevant to the issue in this case; that is, to the question of whether or not, when the accused made the representations to Carson, afterwards found to be false, and upon the strength of which the money was advanced, he knew that such representations were not true.

I think that the views which I have expressed are fully supported by the judgment of the Supreme Court of Canada in *Brunet v. The King*, 57 Can. S.C.R. 83, and more particularly the judgment of Anglin, J., which was concurred in by Davies and Brodeur, JJ.

There remains to consider the effect which the admission of irrelevant evidence has upon the validity of the decision of the trial court. If there is a disclaimer by the trial court of such evidence, in the course of the reasons for judgment, then presumably the validity of the judgment should not be affected. But if there is no such disclaimer, inasmuch as an appellate court cannot discern the degree to which the decision of the trial court has been affected by the evidence improperly admitted, the judgment cannot stand. *Vide Larson v. Boyd* (1919), 58 Can. S.C.R. 275, and particularly at pp. 280 and 281, where (p. 281) this paragraph appears:—

"While without it" (the irrelevant evidence) "there may have been sufficient evidence to warrant the judgment dismissing the action, it is impossible to say that the testimony objected to may not have adversely influenced the trial judge's opinion as to the credibility of the plaintiff and thus occasioned a substantial wrong in the trial. Having received it, though subject to objection, and not disclaimed its having had any effect upon his mind, it is not

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 1931. sible and that it, in fact, had what would seem to be its probable
 effect upon his decision."

See also to the same effect cases there cited, namely *Allen v. The*
 HAMILTON. *King* (1911), 44 Can. S.C.R. 331, and *Loughead v. Collingwood*
 Grant, J.A. *Shipbuilding Co.* (1908), 16 O.L.R. 64. *A fortiori*, where, as in
 the present case, the trial Judge, in his reasons for judgment,
 refers specifically to the evidence improperly admitted, and de-
 scribes it as forming part of the "picture" which established to him
 the guilt of the accused.

The references given by my Lord to the language of the trial
 Judge shew, in my opinion, conclusively that this irrelevant evi-
 dence played a not unimportant part in the making up of his mind
 that the prisoner was guilty of the offences charged. That being
 manifest, I do not see how the conviction can be upheld, even
 though there might be quite sufficient relevant evidence upon the
 record to support it. As already stated, therefore, I agree with my
 Lord that the conviction ought to be set aside and a new trial
 directed.

Appeal dismissed (MULOCK, C.J.O., and GRANT, J.A., *dissenting*).

[KELLY, J.]

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*Dower—Conveyance of Lands by Husband of Plaintiff before his Mar-
 riage to her—Whether Document in its Nature Testamentary—
 Reference to Contemporary Documents to Shew True Meaning—
 Grant to Son Subject to Grantor's Life-estate—Consideration—De-
 livery of Conveyance.*

R. died in April, 1930, leaving his widow, the plaintiff, to whom he
 was married in April, 1912. On and before the 1st March, 1912, R.
 was the owner of lands upon which he and his son carried on a
 hardware business. On that day, R. executed three documents. One
 was a grant of these lands to his son, *after his own death*, in fee
 simple, *habendum* to the son, his heirs and assigns forever. It
 contained the usual statutory covenants and release of all the gran-
 tor's claims upon the lands. Another was an agreement between R.
 and his son providing for the payment by the son to the father of
 \$15 a week during the father's life. And the third was an agree-
 ment between the father, the son, and one B., as trustee, reciting
 that R. had by conveyance of even date conveyed the lands to his
 son, after his own death, that, in consideration of the conveyance,
 the son had agreed to pay to R. \$15 a week during R.'s lifetime,
 and providing that the conveyance should be deposited with B.
 until the death of R. and that B. should hold the conveyance upon
 trust to deliver it to the son upon B. being satisfied that the son had
 fulfilled the terms imposed upon him. Upon the execution of the

conveyance it was delivered to B. as trustee, and the son commenced and continued to make the weekly payments. In March, 1928, an agreement was made between R., his son, and B., which recited the conveyance of March, 1912, and the delivery thereof to B. in trust, and that R. had now decided to relieve B. of his responsibilities as trustee and directed him to deliver the conveyance to the son. It contained a direction by R. to B. to effect registration of the conveyance and unconditionally to deliver it after registration to the son, and a release by R. to B. from all conditions of the agreement of trust of March, 1912; and the son, in consideration of such delivery, agreed with R. to pay him weekly, during the remainder of his life, \$20. The son thereafter made the \$20 payments until R.'s death in 1930. The widow brought this action against the executor of R.'s will, R.'s son, and the son's son, alleging that the two latter were in possession of the lands and that the title thereto was vested in R.'s executor, and claiming dower out of the lands:—

Held, that, in determining what was the real transaction and its nature and effect, the other documents executed concurrently with the conveyance, and which set forth important parts of the bargain not embodied in the conveyance, and which expressed the intention of the parties, were to be considered; and the transaction, as evidenced by the three documents taken together, was in effect a present conveyance of the lands for good and valuable consideration, subject to a life-interest therein retained by R.

Held, also, that the conveyance was duly delivered—B. to hold it as security to R. that the payments would be made by R.'s son, the grantee.

The beneficial estate in the land passed from R. on the making of the conveyance and its delivery to B.; and, if the legal estate remained in R., he should be regarded as trustee for the grantee and bound in law and by his covenant for further assurance to carry out and complete the transaction.

And, the conveyance being prior to the plaintiff's marriage to R., dower did not attach.

It is not necessary for a deed to convey an immediate interest in possession.

Habergham v. Vincent (1793), 2 Ves. Jun. 204, followed.

The plaintiff's contention that the conveyance was of a testamentary character, and was not properly executed as such, could not, having regard to the real nature of the transaction, be given effect.

Governors and Guardians of the Foundling Hospital v. Crane, [1911] 2 K.B. 367, distinguished.

AN action for dower out of lands bordering upon St. Paul-street in the city of St. Catharines.

The action was tried before KELLY, J., without a jury, at St. Catharines.

J. E. Hetherington, for the plaintiff.

A. Courtney Kingstone, K.C., and *H. E. Harris*, for the defendants.

January 12. KELLY, J.:—The plaintiff is the widow of Andrew Riddell, who died on the 12th April, 1930, and to whom the plaintiff was married on the 30th April, 1912, he being then a widower. The defendant Johnston is the executor of Andrew

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Riddell's will, to whom probate has been granted. The defendant Andrew Thomas Riddell is a son of the deceased Andrew Riddell, by an earlier marriage, and the defendant Andrew Everitt Riddell is a son of the defendant Andrew Thomas Riddell.

On and prior to the 1st March, 1912, Andrew Riddell was the owner of these lands, and thereon, with his said son, carried on a hardware business. Andrew Riddell executed three documents bearing that date and referred to at the trial as exhibits 4, 5, and 6 respectively. Exhibit 4 is an agreement between him, of the first part, and the said Andrew T. Riddell, of the second part, in which it was recited that the former was then the owner of the business under the name of Andrew Riddell & Son, and was desirous of relinquishing the active management thereof to his son, and of conveying to him the business, retaining a half interest therein for his life, on the terms therein set forth; and it was also therein recited that "by a conveyance of even date herewith from the party of the first part the party of the second part has become the owner of the lands and premises upon which the said business is carried on, subject to the life-lease providing for the payment by the party of the second part to the party of the first part of the sum of \$15 per week during the life of the said party of the first part;" and it was then and therein understood and agreed that the payments therein provided "and in the life-lease hereinbefore mentioned" are one and the same, and that the total amount to be paid to Andrew Riddell under that agreement and the said life-lease was the sum of \$15 per week.

Exhibit 5, a document made between the said Andrew Riddell, of the first part, and the said Andrew T. Riddell, of the second part, and George Bennett Burson, of the third part, recites that Andrew Riddell "has by conveyance of even date herewith conveyed to the party of the second part after the death of the party of the first part" the said lands, and that in consideration of such conveyance Andrew T. Riddell "has agreed to pay to the party of the first part the sum of \$15 per week during the life of the party of the first part;" and it was further recited that "the conveyance shall be deposited with the trustee" (Burson, who was there agreed upon as trustee) "until the death of the party of the first part;" and it was agreed that Burson should "hold the said conveyance upon trust to deliver the same to the party of the second part upon the death of the party of the first part, and upon the party of the third part being satisfied that the party of the second part has fulfilled the terms and obligations herein-after imposed upon him," namely payment of the said weekly sums of \$15 and other payments there specified, and restoring the buildings if burned, etc.

Exhibit 6, the conveyance above referred to, is made in pursuance of the Short Forms of Conveyances Act. By it Andrew Riddell granted the said lands to Andrew T. Riddell "after the death of the said party of the first part" (Andrew Riddell) "in fee simple," *habendum* unto the party of the second part (Andrew T. Riddell), his heirs and assigns, to and for his and their sole and only use forever. It contains the usual statutory covenants and release by the grantor to the grantee of all his claims upon the said lands. It was then delivered to Burson as trustee, and Andrew T. Riddell commenced and continued to make the said weekly payments to his father, sometimes paying him more than that weekly sum.

On the 1st March, 1928, an agreement was made between Andrew Riddell, of the first part, and Andrew T. Riddell, of the second part, and Burson, of the third part, which recited the above mentioned conveyance (exhibit 6) and the delivery thereof to Burson in trust, and that the party of the first part "has now decided to relieve the party of the third part of his responsibilities as trustee," and has directed him to deliver the conveyance to Andrew T. Riddell. It contains a direction by Andrew Riddell to Burson to effect registration of the conveyance and unconditionally to deliver it after registration to Andrew T. Riddell; and a release by Andrew Riddell to Burson from all the conditions of the agreement of trust of the 1st March, 1912; and Andrew T. Riddell, in consideration of such delivery, agrees with his father to pay him weekly, during the remainder of his life, \$20. The uncontradicted evidence is that Andrew T. Riddell continued to make the \$20 payments thereafter and until his father's death.

The plaintiff alleges that on the 20th February, 1930, Andrew T. Riddell purported to convey the said lands to himself and his son, his co-defendant Andrew Everitt Riddell, as joint tenants, who have since that time been in possession thereof, and that in the circumstances the title to the lands and premises is vested in the defendant Johnston as personal representative of Andrew Riddell, deceased. She asks for a declaration that she is entitled to dower therein and for damages for detention of dower, the contention on her behalf being that the conveyance (exhibit 6) is void as being of an interest arising after the death of the grantor; that there was no delivery of the conveyance until 1928; and that the document is of a testamentary nature, but invalid as such for want of compliance with the provisions of the Wills Act.

An important consideration, of course, is whether, on and after the making of the documents of the 1st March, 1912, Andrew Riddell continued to have, until his marriage to the plaintiff, an

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ownership of or interest in the lands out of which the plaintiff on her marriage became possessed of an inchoate right to dower. If the transaction between Andrew Riddell and his son on the 1st March, 1912, was solely and only that which was expressed in the conveyance of that date (exhibit 6) the case would be within the law as stated by Farwell, L.J., in *Governors and Guardians of the Foundling Hospital v. Crane*, [1911] 2 K.B. 367, at p. 379—that a deed of grant of the grantor's own property to take effect only on the death of the grantor is necessarily testamentary and cannot be turned into a deed—and the plaintiff's contention that this document is of a testamentary character would be substantiated. But, in determining what was the real transaction and its nature and effect, the other documents which were made concurrently with the conveyance and which set forth important parts of the bargain which were not embodied in the conveyance itself, and which express the intention of the parties, should not and cannot be disregarded. For instance: (1) the grantee agreed to give and did give consideration for the grant, and in that sense it was not a mere voluntary grant on the grantor's part; (2) in other respects also the grantor's intention as well as that of the grantee is more fully and definitely expressed in their agreement (exhibit 4); (3) there is no power of revocation reserved to or retained by the grantor; (4) the transaction, as evidenced by all the concurrent documents, when taken together, was in effect a present conveyance of the lands for good and valuable consideration, subject to a life-interest therein retained by the grantor, and, therefore (and this conclusion is borne out by the grantor's declaration in exhibit 4 of ownership in the grantee) the grantee should then have a present estate and interest in the lands subject to the life-interest in the grantor.

I do not agree with the contention that the conveyance was not delivered; the logical deduction from a consideration of all the documents is that the purpose and intention of the parties were that Mr. Burson, who was solicitor for the grantor and grantee, should hold it not as undelivered but as securing to the grantor that the payments agreed to be made by the grantee would be made. What is essential to delivery of a document as a deed is that the party whose deed the document is expressed to be shall by words or conduct expressly or impliedly acknowledge his intention to be immediately and unconditionally bound by the provisions contained therein: Halsbury's Laws of England, vol. 10, para. 690, p. 386.

My opinion is, that the grantor did not intend that the grant (exhibit 6) should be his deed only on the happening of a cer-

tain event, but that he intended it as a present conveyance by which the title should, on the making of it, vest in his son, subject to himself retaining a life-interest. Much depends upon the intention. In the *Foundling Hospital* case, *supra*, at p. 377, it was stated that the mode in which delivery operates is a question of intention, primarily of the grantor, and secondarily of the grantee; and in *Habergham v. Vincent* (1793), 2 Ves. Jun. 204, at p. 230, it is said: "It is not necessary for a deed to convey an immediate interest in possession; but it must take place, as passing that interest to be conveyed, at the execution."

In Elphinstone's Rules for the Interpretation of Deeds (Blackstone edition, 1889), these propositions are stated in a note at p. 122, founded on cases in United States Courts there cited:—

"1st. Where the grantor places in the hands of a depository a deed to be delivered to the grantee upon the death of the grantor—reserving the right or power to recall the deed at any time before his death, there is no delivery, and the deed passes no title to the premises described. In such cases the depository is the agent of the grantor, and holds the deed subject to his direction and control.

"2nd. But where the grantor delivers the writing *as his deed*, to be delivered to the grantee at his death, or on some future event, it is the grantor's deed presently, and the depository becomes a trustee of the grantee. . . . In such a case the deed passes a present interest to be enjoyed in the future."

If I am correct in my conclusions, then the beneficial estate in the lands passed from the grantor (subject to the grantor's life-estate) on the making of the conveyance and its delivery to Burson. Moreover, even if the legal estate remained in the grantor after he had so given the beneficial estate to his son, he would be regarded as trustee for the grantee and bound in law and by his covenant for further assurance to execute such assurances as might be necessary to carry out and complete the transaction; and, the conveyance being prior to the plaintiff's marriage to the grantor, dower would not attach.

While I have not been able to find any case which in all essential facts resemble this case, I am of opinion that the conclusions I have reached are founded on a correct interpretation of the law. The action must, therefore, be dismissed. There is no reason why the defendants should not have their costs, if they ask for them.

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ZIMMERMAN v. NORTHERN LIFE ASSURANCE CO. OF CANADA.

Jan. 16.

Insurance (Life)—Action on two Policies—Defences—Fraudulent Misrepresentation—Non-disclosure of Material Facts—Insurance Act, R.S.O. 1927, ch. 222, sec. 125—"Within his Knowledge"—"Conscious."

The words "within his knowledge" in subsec. 1 of sec. 125 of the Insurance Act, R.S.O. 1927, ch. 222, and the word "conscious" in subsec. 2, introduced in the revision of 1924, have the effect of modifying the doctrine stated in *Jordan v. Provincial Provident Institution* (1898), 28 Can. S.C.R. 554, to the extent of limiting misrepresentation and failure to disclose to such things as are within the knowledge of the insured and are material to the risk.

In an action by the beneficiary named in two policies of insurance upon the life of M., issued respectively in 1928 and 1929, it was held, that the second policy was vitiated by the failure of M. to disclose the facts relating to a serious illness in December, 1928, such facts being material and within his knowledge.

In regard to the first policy, there was nothing to indicate any conscious failure by him to disclose any fact within his knowledge that was material to the contract, or any misrepresentation of a fact within his knowledge that was material to the contract.

ACTION by the beneficiary of two policies issued by the defendant company upon the life of Frank C. McBride, a young farmer, of the county of Norfolk, who died in November, 1929, to recover the amount of money secured by the policies.

The action was tried before RANEY, J., without a jury, at St. Catharines.

A. E. Mix, for the plaintiff.

J. G. Gillanders, for the defendant company.

January 16. RANEY, J.:—The policies were for \$1,000 each, the first of them being dated the 21st April, 1928, and the second the 4th September, 1929. The defence is fraudulent misrepresentation and non-disclosure of facts material to the contracts. There was no medical examination in either case, the company, in accepting the risks, relying upon the answers made by the assured to printed questions.

McBride was not seeking life insurance. In both instances he yielded to the solicitations of an agent of the company, who offered to pay the premiums for him and did pay them, taking promissory notes from McBride, which at the time of the trial the agent still held. In each case the answers were written by the agent on information furnished by McBride, and the papers were signed by McBride.

In the case of the first application the "statements and answers" which are now put forward by the company in resisting payment are as follows:—

"4. A. Have you ever had any illness, disease, operation or accident? A. No.

"B. Have you ever consulted a physician? A. Yes.

"C. Has any unfavourable medical opinion ever been given regarding your physical condition? A. No.

"If any of the above questions are answered 'yes,' give full particulars, including name of illness or accident, etc., date, duration, result and name and address of attending physician. A. Colds. Dr. Copeman."

9. Have you ever had any disease or accident, not yet mentioned? If so, give details. A. No.

"10. Have you ever consulted a physician for anything not mentioned herein? A, No.

.....
"B. If so, for what and when?

"C. Give physician's name and address.
.....

"19. Are you now free from disease or symptoms of disease and in perfect health? A. Yes."

This application was signed on the 2nd April, 1928. The facts were that at that time McBride had had two illnesses. The first was in April, 1924. His attending physician at Simcoe at that time was Dr. McGillivray, whose assistant was Dr. Copeman. Both physicians saw McBride and after consultation they sent him to St. Joheph's Hospital at Hamilton, where he was under observation by Dr. Parry. From the symptoms as described to him by McBride, Dr. Parry diagnosed the case as one of renal calculus (stone in the kidney), but the symptoms had disappeared after McBride's arrival at the hospital, the X-ray pictures were negative, and Dr. Barry's diagnosis was based wholly on what was reported to him by McBride. After three or four days, McBride returned to his farm near Simcoe. There is no evidence that McBride was told in 1924, or later, of the diagnosis that Dr. Parry had made.

Then in April, 1927, McBride went to the hospital at Simcoe with a trouble which Dr. Copeman, who also attended him at that time, diagnosed tentatively as influenza. At the hospital it turned out to be a mild form of measles.

In the case of the application for the second policy the "statements and answers" were as follows:—

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"4. A. Have you ever had any illness, disease, operation or accident? A. No.

"B. Have you ever consulted a physician? A. No.

"C. Has any unfavourable medical opinion ever been given regarding your physical condition? A. No.

"If any of above questions are answered 'yes,' give full particulars, including name of illness or accident, etc., date, duration, result and name and address of attending physician." (No answer).

Questions 9, 10, and 19 were answered as on the former application in 1928.

The application for this policy was signed on the 26th August, 1929, shortly before McBride's last illness. It will be noticed that in this application McBride gave himself a clean bill of health, not mentioning Dr. Copeman or the illnesses he had referred to as "colds" in his application of the year before.

At the time of this second application, besides the illnesses of 1924 and 1927 already referred to, McBride had had an illness in December, 1928, that is to say after the issue to him of the first policy. On that occasion he had gone to Dr. English, of Simcoe, complaining of abdominal pains. Dr. English made a physical examination, diagnosed the trouble as appendicitis, and prescribed an operation. McBride told Dr. English he would not submit to an operation, and Dr. English then told him that he could not treat his case any further.

McBride was taken ill again about the 20th September, 1929, and died on the 11th November, 1929, from multiple abscesses of the liver and diffused peritonitis. The theory of the defence is that his appendix was the cause not only of his illness in March, 1924, and again in December, 1928, but also of his last illness, and that the abscesses of the liver came from poison diffused through the blood-stream from a diseased appendix.

The defendant company also put forward the answers given by McBride to question 17, concerning his family history. In his first application, in answer to this question he had stated that his father and mother and brothers and sisters were "not known." The fact was that he had been adopted into the McBride family when quite a young child. In his second application he gave certain information under this head which evidently had reference to his foster-parents and their family; so that this answer had no real relevancy to his application. Though the answers to question 17 were put forward at the trial, I did not understand counsel for the company to press them seriously. In any event, I think, they are not material to the case.

The papers carrying the statements and answers above set forth are printed forms headed, "statements and answers in continuation and forming part of my application for insurance in the Northern Life Assurance Company of Canada."

And at the foot just above the signature of the applicant appears this paragraph:—

"I, the undersigned applicant for insurance, declare that the answers to the above questions are full, complete and true, and are correctly recorded, and that I know of no unfavourable circumstances in connection with my past or present health which is not given above."

A clause of the policy provides: "This policy and the endorsement hereon, together with the application for insurance, constitute the entire contract. . . . All statements made by the insured shall be deemed representations and not warranties. . . . The misrepresentation or concealment of any material fact shall render this policy null and void."

The statutory provisions applicable to the policy are contained in the Insurance Act, R.S.O. 1927, ch. 222. Section 125 of the Act requires (subsec. 1) the insured to "disclose to the insurer every fact within his knowledge which is material to the contract," and declares (subsec. 2) that "any conscious failure to disclose, or any misrepresentation of a fact material to the contract on the part of the insured . . . shall render the contract voidable at the option of the insurer."

Section 126 emphasises materiality by providing that "no contract shall be rendered void or voidable by reason of any misrepresentation, or any failure to disclose on the part of the insured . . . unless the representation or failure to disclose is material to the contract."

The words "within his knowledge" in subsec. 1 of sec. 125, and the word "conscious" in subsec. 2, were introduced into the Act in the revision of 1924. They were not in the Act at the time of the issuance of the policy which was in question in *Ontario Metal Products Co. Ltd. v. Mutual Life Insurance Co. of New York* (1923), 54 O.L.R. 299, [1924] S.C.R. 35, and, *sub nom. Mutual Insurance Co. of New York v. Ontario Metal Products Co. Ltd.*, [1925] A.C. 344. The Ontario statute law considered in that case was sec. 156 of the Insurance Act, R.S.O. 1914, ch. 183. Applying the language of that section to the facts of that case, the Judicial Committee of the Privy Council declared the law as to materiality to be that it is a question of fact in each case whether, if the matters concealed or misrepresented had been truly disclosed, they would, on a fair consideration of the evi-

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CANADA. Under the statute as it stood before 1924 (R.S.O. 1914, ch. 183, sec. 194), the words "false statement" in the 20th statutory condition applicable to contracts of fire insurance, were interpreted by the Courts as though the words were "fraudulently false statements:" *Kostuk v. National Ben Franklin Fire Insurance Co.* (1926), 60 O.L.R. 56.

There was no corresponding interpretation by the Courts of the word "misrepresentation" as used in subsec. 3 of sec. 156 of the Revised Statute of 1914, or in the previous Insurance Acts, with reference to contracts of life insurance; on the contrary, it was held by the Supreme Court of Canada in *Jordan v. Provincial Provident Institution* (1898), 28 Can. S.C.R. 554, that material misrepresentation upon an application for life insurance avoided the policy, notwithstanding that the representations may have been made in good faith and in the conscientious belief that they were true. In the more recent case of *Town of Arnprior v. United States Fidelity and Guaranty Co.* (1914-15), 30 O.L.R. 618, and 51 Can. S.C.R. 94, doubt was cast on the judgment in the *Jordan* case, both by the Chief Justice of Ontario in the Appellate Division of this Court (see p. 643), and by Mr. Justice Anglin in the Supreme Court of Canada (see p. 111), but on another aspect of the case. And it will be observed that, though the word "conscious" is introduced in subsec. 2 of sec. 125 of the present revised statute, before the words "failure to disclose," it is not introduced before the word "misrepresentation" which immediately follows. Under subsec. 2 the insurer is not bound to disclose every fact "which is material to the contract," but only "every fact within his knowledge which is material to the contract," and the "misrepresentation of a fact material to the contract" referred to in subsec. 2 is the misrepresentation of the fact referred to in subsec. 1; that is to say, "within his knowledge." In other words, subsec. 2 should be read as though its language were, "any misrepresentation of a fact within his knowledge and material to the contract."

I think the present statute had the effect of modifying the doctrine as stated in the head-note of the *Jordan* case, to the extent of limiting it to misrepresentations within the knowledge of the insured.

There can be no doubt of the materiality of McBride's illness of December, 1928, or that the facts of that illness were within his knowledge. My inference from the medical evidence is that the diseased appendix, as then diagnosed by Dr. English, was the cause of McBride's death. The non-disclosure of that illness vitiates the second policy.

The non-disclosure and misrepresentations in his application for the first policy stand on a different footing. For anything that appears in the evidence, McBride may not have known that he was suffering, in April 1924, from anything more serious than a cold that had produced a temporary kidney derangement. Dr. Parry of the Hamilton hospital had no objective symptoms to assist him, and, so far as appears, no purpose was to be served at that time by informing McBride that the subjective symptoms suggested stone in the kidney. There is no evidence that McBride ever suffered from that malady, or that he was ever told that he did.

It is true that Dr. McGillivray attended McBride in 1924, and that McBride did not mention this fact in his application, but Dr. McGillivray left the locality shortly afterwards, having turned his practice over to Dr. Copeman, and every purpose of the insurance company was served by giving Copeman's name, as McBride did. The company appears not to have been sufficiently interested to make inquiries of Dr. Copeman, as it might have done had it been curious. If Dr. McGillivray's name had been mentioned in the application, it would not have inquired of him.

The illness of April, 1927—a mild form of measles—was not material.

There is nothing in the evidence to indicate that any matter within his knowledge, and material to the contract, was concealed by McBride on his first application—nothing to suggest that if he had disclosed all the facts of which there is now evidence that he had knowledge, connected with his illnesses of 1924 and 1927, the company would have been influenced to decline the risk or to stipulate for a higher premium. Adopting the phraseology of the statute, there is nothing to indicate any conscious failure by McBride to disclose any fact within his knowledge that was material to the contract, or any misrepresentation of a fact within his knowledge that was material to the contract.

Moreover, I am not satisfied on the evidence that as a fact McBride's illness of 1924 had any connection with his last illness in 1929.

There will be judgment for the plaintiff for \$1,000, with interest from the date of the writ of summons and two-thirds of the costs of the action.

In view of the suggestion at the trial of the possibility of a claim by McBride's executor, the insurance company may pay the insurance moneys with interest into court. Upon that being done, the company will be discharged from all liability to the plaintiff.

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Jan. 19.

CROTON V. LEONARD AND JOHNS.

Negligence—Injury to Passenger in Motor-truck—Negligent Operation upon Highway by Servant of Owner—Express Prohibition against Taking Passengers—Disobedience—Caprice of Servant—Non-liability of Owner.

The judgment of LOGIE, J. (1930), *ante* 283, affirmed.

AN appeal by the plaintiff from the judgment of LOGIE, J. (1930), *ante* 283.

January 19, 1931. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

T. R. Deacon, for the appellant, argued that the defendant Leonard was responsible for the negligence of his servant, the defendant Johns. The master could not escape liability by forbidding the act. The defendant Leonard, through his servant Johns, permitted the plaintiff to ride: *Harris v. Perry & Co.*, [1903] 2 K.B. 219.

R. Howard Yeats and *H. A. F. Boyde*, for the defendants, respondents, was not called upon.

LATCHFORD, C.J. (at the close of the argument for the appellant):—We all think the appeal should be dismissed with costs, for the reason stated by the trial Judge for dismissal of the action, namely, that the taking of a passenger on the truck was not an act which came within the scope of the driver's authority, and was not a mode of exercising his master's employment. In addition, the driver's action was contrary to the express orders of his master. Consequently, the master should not be held liable for the injury sustained by the plaintiff.

Appeal dismissed.

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TOWNSHIP OF NELSON V. DOMINION NATURAL GAS CO. LTD.

Jan. 20.

Municipal Corporations—By-law—Distribution of Natural Gas—Exclusive Franchise—Licence—Invasion of Rights—Municipal Franchises Act, R.S.O. 1927, ch. 240, secs. 3 (1), 6 (a) — Highway Improvement Act, R.S.O. 1927, ch. 54, sec. 67—Public Utilities Act, R.S.O. 1927, ch. 249, secs. 54, 55.

The judgment of WRIGHT, J. (1930), *ante* 271, was affirmed (subject to a variation), for the reasons stated by WRIGHT, J.; and also on the ground that secs. 54 and 55 of the Public Utilities Act prohibit the defendant company from exercising its powers within the municipality.

AN appeal by the defendant company from the judgment of WRIGHT, J. (1930), *ante* 271.

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January 20, 1931. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

Grayson Smith, K.C., and *Edmund Sweet*, K.C., for the appellant company, argued that, by virtue of the licence granted to it by the Department of Highways, it was authorised and empowered to lay its pipe-lines on the Provincial Highway No. 2, and that, by virtue of the provisions of clause (a) of sec. 6 of the Municipal Franchises Act, R.S.O. 1927, ch. 240, it had a right to supply gas to persons whose lands abut on this highway.

J. C. McRuer, K.C., *E. H. Cleaver*, K.C., and *F. A. Brewin*, for the plaintiff corporation, respondent, contended that the appellant company had no right to supply gas to any of the inhabitants of Nelson township, as no by-law granting such right had been passed by the municipal council, and assented to by the municipal electors, as required by subsec. (1) of sec. 3 of the Municipal Franchises Act. Reference also to the Public Utilities Act, Part V., R.S.O. 1927, ch. 249, secs. 54 and 55*.

At the conclusion of the argument, THE COURT pronounced judgment dismissing the appeal.

The following reasons for judgment were afterwards read:—

LATCHFORD, C.J.:—This appeal is from the judgment of Wright, J., of the 23rd October, 1930, after trial without a jury.

The plaintiff, a municipal corporation, passed a by-law on the 20th February, 1929, authorising its reeve and council to execute an agreement with a company called the United Fuel Investments Ltd., granting it an exclusive franchise for 30 years:—

*54. This Part shall apply to every company heretofore or hereafter incorporated for the purpose of supplying any public utility.

55.—(1) The company shall not exercise any of its powers within a municipality unless and until a by-law of the council of the municipality has been passed with the assent of the municipal electors where such assent is required by the Municipal Franchises Act authorising the company to exercise the same and the company when so authorised may exercise any of the powers of expropriation conferred on a municipal corporation by Parts I. and II., if the power to expropriate is conferred on it by the letters patent incorporating the company or by supplementary letters patent.

(2) Subject to subsection 1 a company may conduct any of its pipes or carry any of its works through the land of any person lying within ten miles of the municipality for supplying which the company was incorporated.

(3) The powers of expropriation conferred on a company shall be exercised under and in accordance with the provisions of the Railway Act.

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"To enter upon all streets and public squares and all lanes and other public places in all parts of concessions 2, 3, and 4 south of Dundas-street and in Brant's block, now or at any time hereafter within the jurisdiction of the council, to dig trenches and lay and bury therein and to maintain, operate, and repair mains and pipes of such sizes as the said company may require for the transportation and distribution and supply of gas in the said portion of the Township of Nelson for fuel and lighting purposes, together with the right to construct and maintain and repair, under the surface of such streets and public squares and lanes and public places, all necessary regulators, valves, kerb-boxes, safety appliances, and other appurtenances, that may be necessary in connection with the transportation and distribution and supply of gas."

The by-law was confirmed by 19 Geo. V. ch. 135, and pursuant thereto the exclusive franchise agreement contemplated was duly executed.

A provincial highway passed through the municipality, and the defendant obtained from his Majesty, thereunto represented by the Minister of Public Highways for the Province of Ontario, a licence to lay its pipe-lines in and along the highway. The defendant contends that it has the right (which it has exercised) of placing service-lines leading from its mains in the highway to the property of persons occupying land abutting on the road, and to supply natural gas to such persons as it has in fact done in a few cases.

The action was for damages and an injunction.

The contentions of the respective parties mentioned by Wright, J., were substantially those presented before this Court. In addition attention was called to the provisions of Part V. of the Public Utilities Act, R.S.O. 1927, ch. 249, secs. 54 and 55. Taken together these sections prohibit the defendant from exercising any of its powers within the municipality.

This was conclusive, as no such by-law had been passed in the interest of the defendant company, and it was undoubtedly exercising its powers "within the municipality."

The appeal should be dismissed with costs and judgment varied by omitting the provision for the passage of a by-law. To enable the persons supplied with gas by the defendant to make other arrangements, the time for the issue of the injunction should be extended until the 1st May, 1931.

RIDDELL, J.A.:—Through a corner of the township of Nelson runs a provincial highway; the defendant company has received permission to run its pipes along this part of the highway (*inter alia*). It has not confined its operations to placing and retaining

such pipes; but it has supplied certain inhabitants of the township with its product, natural gas, by laying small connecting pipes from the main pipe to the side of the highway. No permission so to do has been given by the township; and the township now brings its action to restrain the practice.

At the trial, Mr. Justice Wright, in a carefully written judgment, decided in favour of the township's claim; and the gas company now appeals.

I express no opinion as to whether the judgment should be supported upon the grounds stated in my learned brother's judgment; I do not consider it necessary to consider them, as a statute cited before us for the first time in the case seems to be perfectly conclusive.

The Public Utilities Act, R.S.O. 1927, ch. 249, after defining "Public Utility" to include natural gas (sec. 1), and making applicable to such a company as the defendant Part V. (sec. 54), proceeds to prohibit any such company from exercising "any of its powers within a municipality unless and until a by-law of the council of the municipality has been passed . . . authorising the company to exercise the same . . . " (sec. 55(1)).

The language of the Act being free from any ambiguity, we are to give it its natural interpretation—we have nothing to do with the object of the Act or the advisability of such legislation.

The effect of the Act is to give the township full control of the supply of natural gas; and it is a violation of the rights of the township corporation for a company to "exercise any of its powers" within the township without a township by-law authorising it so to do.

It requires no authority to shew that the township corporation has a right of action, its statutory rights being interfered with; and the appeal must be dismissed with costs.

The plaintiff corporation does not complain of the company running its pipe along the provincial highway; and no order is asked in that respect. Moreover, the plaintiff corporation consents that the operation of the order be stayed until the 1st April, 1931.

FISHER, J.A.:—Mr. Justice Wright's ground of decision, with which I agree, is sufficient to support his judgment, and it can also be supported under secs. 54 and 55 of the Public Utilities Act, R.S.O. 1927, ch. 249.

*Order as stated by LATCHFORD, C.J.**

*On a subsequent application (19th March, 1931), the Court directed that a clause might be added to the order stating that it is "without prejudice to any rights or powers which the defendant company may afterwards acquire."

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[APPELLATE DIVISION.]

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REX V. HAND.

Jan. 21.

Intoxicating Liquors—Liquor Control Act (Ontario), sec. 72 (1)—Husband and Wife—Conviction of Husband for Unlawfully Keeping Liquor for Sale—Acquittal of Wife on same Charge—Evidence of Sale by Wife.

The defendants, husband and wife, were charged with the offence of unlawfully keeping intoxicating liquor for sale in their dwelling house, in contravention of the Liquor Control Act (Ontario). The husband was convicted on evidence of a sale made by the wife in that house, and the wife was acquitted:—

Held, that, although she might have been convicted of *selling*, she was properly acquitted upon the charge of keeping for sale.

On the 17th September, 1930, an information was laid before A. L. Tinker, Esq., Police Magistrate in and for the City of Toronto, charging Elizabeth Hand and James Hand that they, within three months ending on the 16th September, 1930, at the city of Toronto, in the county of York, unlawfully did keep liquor for sale, at 14 Shirley-street, in contravention of the Liquor Control Act (Ontario).

On the 24th September, 1930, the charges were heard before R. J. Browne, Esq., Police Magistrate in and for the City of Toronto, when he convicted James Hand of the offence as charged and dismissed the complaint as against Elizabeth Hand.

James Hand appealed from his conviction, and the Crown appealed from the dismissal of the charge against Elizabeth Hand.

The appeals were heard by O'CONNELL, Jun.Co.C.J., and both were dismissed, for the following reasons:—

It appears from the evidence that James Hand and Elizabeth Hand are husband and wife and live together in a dwelling house in the city of Toronto known as 14 Shirley-street. There is no direct evidence as to which of the parties is the tenant of the house, but under the circumstances it may be presumed that the husband is the tenant, and in any event there is no evidence that Elizabeth Hand is the tenant. Where a man and wife are living together in the same dwelling house, in the absence of evidence to the contrary, it is a fair presumption that the husband is the tenant. It appears from the evidence that two police officers had the premises under surveillance from about 8.30 to 9.30 in the evening of the 16th September, and they then saw beer served by Elizabeth Hand to several persons who were upon the premises, and for which she received payment. It appears that James Hand during part of this time at least was lying in bed in another room and was not present at any part of the time during the trans-

action. The same police officers on several previous occasions had seen liquor served upon the premises by James Hand. Evidence was adduced on behalf of the accused to the effect that they did not at any time sell liquor, and the liquor which they had in fact served was given gratuitously to their guests. At the conclusion of the evidence the Police Magistrate convicted James Hand of the offence as charged and dismissed the complaint as against Elizabeth Hand. James Hand appeals from the conviction and the Crown appeals from the decision of the Police Magistrate dismissing the charge as against Elizabeth Hand. I find that there was ample evidence to sustain the conviction of James Hand, and consequently his appeal will be dismissed and the conviction affirmed with costs.

The charge is laid under the Liquor Control Act (Ontario), sec. 72(1), which reads as follows:—

“Except as provided by this Act, no person shall within the Province, by himself, his clerk, servant or agent, expose, or keep for sale, or directly or indirectly or upon any pretence, or upon any device, sell or offer to sell liquor or in consideration of the purchase or transfer of any property, or for any other consideration, or at the time of the transfer of any property, give to any other person liquor.”

Section 72(1) in my opinion creates at least four different offences: (1) exposing liquor; (2) keeping for sale liquor; (3) selling or offering to sell liquor; (4) giving to any person liquor for any consideration, or at the time of the transfer of any property. Elizabeth Hand is charged with one of these offences, namely, keeping liquor for sale. As at the time that the said offence is said to have been committed, she was residing with her husband, James Hand, upon the premises where the liquor was kept, the liquor, in the circumstances of this case, could not be said to have been kept for sale by the said Elizabeth Hand, but by her husband, who was, as I have already stated, presumably, the tenant of the premises upon which the parties were residing. He, in fact, was charged with this offence, namely, keeping liquor for sale, and was by the Police Magistrate found guilty and convicted of the said offence—quite properly so in my opinion. If Elizabeth Hand had been charged with selling, there was ample evidence to convict her on that charge; but, as she was not charged with having committed this offence, she could not be properly convicted therefor, and she could not be properly convicted of the offence of keeping liquor for sale, for the reasons already stated, especially so as her husband had already been convicted of keeping for sale in respect to the transaction upon which the charge against his wife was founded.

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The appeal therefore of the Crown as against the dismissal of the charge laid against Elizabeth Hand will be dismissed without costs.

The Crown appealed from the dismissal of the charge against the wife.

January 21, 1931. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

W. B. Common, for the Crown, argued that there was ample evidence to warrant a conviction of the wife for keeping liquor for sale. Her husband had been convicted, and, if he was guilty, she also was guilty.

No one appeared for the accused.

At the conclusion of the hearing the judgment of the Court was delivered by LATCHFORD, C.J.:—We all are of opinion that this appeal fails. The respondent's husband was convicted of keeping liquor for sale in the house in which he lived with his wife on evidence of a sale made by her therein. Had the accusation been selling, and not keeping for sale, a conviction for that quite different offence could doubtless have been properly made. However, the conviction of the husband established that it was he who was keeping the liquor for sale, and his wife could not, in the circumstances, have been rightly convicted of the same offence upon the evidence adduced.

Appeal dismissed.

[RANEY, J.]

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Jan. 22.

HARKIES V. LORD DUFFERIN HOSPITAL.

Negligence—Hospital—Liability for Injury to Patient—Impossibility of Ascertaining how Accident Happened—Inference that Attendants Negligent—Res Ipsa Loquitur—Limitation Provisions of Statutes not Applicable.

A boy of three years, a patient in the defendant corporation's hospital, was scalded and burnt by steam escaping from an apparatus designed for his treatment by steam inhalation for pneumonia. The nurse in charge was absent from the room at the time, and was recalled by the boy's screams. She found the apparatus in order and was not able to account for the condition of the patient. In an action by the patient and his father to recover damages arising from the former's injuries, it was not shewn how the accident happened, but there was evidence to shew that the apparatus was safe if proper care was taken:—

Held, that, the obligation of the defendant corporation being not merely to supply properly qualified nurses, but to nurse the patient, the only inference to be drawn from what happened was that there

was an absence of proper care on the part of the hospital attendants
—*res ipsa loquitur*.

And *held*, that the defendant corporation was liable for the negligence of its servants.

Nyberg v. Provost Municipal Hospital Board, [1927] S.C.R. 226, and *Brawley v. Toronto Railway Co.* (1919), 46 O.L.R. 31, followed.

Section 11 of the Public Authorities Protection Act, R.S.O. 1927, ch. 120, and sec. 18 of the Hospitals and Charitable Institutions Act, R.S.O. 1927, ch. 349, relied on by the defendant corporation as in combination barring the action because not commenced within six months next after the act, neglect, or default complained of, have no application to the facts of this case.

THE infant plaintiff, a child of three, sued, by his father as next friend, for damages resulting from burns suffered whilst a patient in the Lord Dufferin Hospital at Orangeville, and the father, a railway sectionman, claimed for expenses incurred in consequence of the injuries to his child.

The action was tried before RANEY, J., without a jury, at Orangeville.

J. D. Lucas, for the plaintiffs.

Peter White, K.C., and *H. B. Church*, for the defendant corporation.

January 22. RANEY, J.:—The Lord Dufferin Hospital was incorporated by an Ontario statute, 1924, 14 Geo. V. ch. 151.

The child was brought to the hospital early on the morning of the 10th June, 1929, suffering from pneumonia, Dr. Scott, the attending physician, having previously made the arrangements with the hospital authorities and given directions for treatment by steam inhalation. The apparatus for the production of the steam consisted of an ordinary tea-kettle set on a chair, with a short length of garden hose to carry the steam from the spout of the kettle to the child's crib. The child was placed in the crib, which was fitted with a sheet as a canopy, and the steam was introduced under the canopy by the hose, which extended about three inches into the crib at the head, and was there fastened to the framework of the crib.

The child was doing nicely until the night of the 12th June. Dr. Scott had called at about 9 o'clock on that evening and examined him. After he went away, the nurse says, she went to an adjoining room for a few minutes. Whilst there she was attracted by the child's cries; and, returning to the room, took the child out of the crib and found he had been very severely scalded. She says that when she returned she found the apparatus in order, and she was wholly unable to account for the condition of the child. Miss Sproule, the night superintendent, was summoned

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by Miss Dynes (the nurse). Miss Sproule found the apparatus still in operation—everything as it had been. Dr. Scott was also summoned. He had left the child only about half an hour before. The child must have been awake then, because Dr. Scott had him out of the crib examining him. It is not improbable that he was still awake under the canopy when the nurse left the room after the doctor left. It is possible that the child may have interfered with the end of the hose; but, if that was the cause of the accident, one would have expected that the burns would have been on his hands and head and the upper part of his body. Instead of that they were mainly on his back and down his left leg almost to the ankle. The parents were not notified until the following morning.

The child was kept in the hospital from June till November for treatment of his burns. He was then removed to his home in Orangeville; but, running sores having developed, in April, 1930, he was brought to the Sick Children's Hospital in Toronto. He was under treatment there from April to November, when, just before the trial, he was taken back to Orangeville. At the Toronto Hospital about 70 square inches of scarred tissue were excised from his back and left leg in four or five separate operations. At the time of the trial his left leg was still bandaged, and the dressing had to be changed every day. He has now the full use of all his joints. His left leg is a little smaller than the other, and he limps a little, but he runs around, and the doctors say the limp will disappear.

The hospital had used the same apparatus on three previous occasions. On those occasions it had worked efficiently and satisfactorily. Dr. Scott had been the attending physician in one of these cases. He also had knowledge of treatment of patients by similar apparatus in other hospitals, and he had never heard of a patient being scalded by the treatment. He considered it a safe apparatus, and, so far as he knew, it was being properly used at the time of the accident.

Dr. Harris, who had had ten years' experience in the Toronto Sick Children's Hospital, said that the apparatus was similar to that in use in that hospital. Dr. Shier, of Orangeville, said he had used the apparatus with patients, and had never had any trouble with it.

Miss Dynes, nurse-in-training, who was the nurse in charge of the case, had had nine months' experience in the hospital. She had not used the apparatus before, but had been instructed in its use in lectures.

The medical men, all of them called for the defence, agreed that the apparatus was safe if proper care was taken. Of course

more care would be necessary in the case of a child without sense, but old enough to be active.

It is, I think, impossible on the evidence to construct a theory as to how the accident happened, and my feeling at the close of the evidence was that there was something more to be told.

"It is now settled that a public body is liable for the negligence of its servants in the same way as private individuals would be under similar circumstances, notwithstanding that it is acting in the performance of public duties, like a local board of health, or of eleemosynary and charitable functions, like a public hospital:" *per* Lord Justice Farwell in *Hillyer v. Governors of St. Bartholomew's Hospital*, [1909] 2 K.B. 820, 825; cited with approval by the Chief Justice of the Supreme Court of Canada, speaking for the majority of the Court, in *Nyberg v. Provost Municipal Hospital Board*, [1927] S.C.R. 226, 229.

In the present case, as in the *Provost* case, the obligation undertaken by the hospital was not merely to supply properly qualified nurses, but to nurse the infant plaintiff, and the medical evidence being all one way that the apparatus, which had the approval of Dr. Scott, was a safe and proper apparatus if operated with care, the only inference to be drawn from what happened is that there was an absence of proper care on the part of the hospital attendants. In other words, the case is, I think, within the maxim *res ipsa loquitur*. The expansion of this maxim, as stated by Sir William Meredith in *Brawley v. Toronto Railway Co.* (1919), 46 O.L.R. 31, 34, is appropriate to the facts of this case:—

"Where an accident happens from an inanimate object, and is one that does not ordinarily happen if the persons who have the management of it use proper care, it may be inferred, in the absence of any explanation from them, that it has happened through their want of care."

The same principle was stated in a more recent case by Mr. Justice Logie in *Rae v. Wellesley Hospital Ltd.* (October, 1894, unreported) in these words:—

"When damage is occasioned by something getting out of control which ordinarily ought to be under control by the person using it, there is the reasonable presumption of fact that the mishap is due to the negligence of the user or servant, unless it can be explained."

This case was carried by the defendants to the Appellate Division of this Court, where the judgment of Mr. Justice Logie was affirmed.

There is a very full review of the earlier cases of this character in *Lavere v. Smith's Falls Public Hospital* (1915). 35

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Raney, J. O.L.R. 98, which was approved by the Supreme Court of Canada in the *Provost* case (*supra*).

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The writ in this action not having been issued within six months "next after the act, neglect or default complained of," the hospital pleads the provisions of sec. 11 of the Public Authorities Protection Act, R.S.O. 1927, ch. 120, and sec. 18 of the Hospitals and Charitable Institutions Act, R.S.O. 1927, ch. 349, the combined effect of which, counsel for the hospital argues, is to put the plaintiffs out of court. The sections relied on of the Acts in question have, I think, no application to the facts of this case.

The quantum of damages is a difficult question. The consensus of the medical testimony is that, apart from the scars, there will be no permanent disability, but looking at the photographs of the child which were taken before any of the scarred tissue had been excised, and looking at the child as he was at the trial, it is, I think, a commonsense conclusion that the effect of the scars is, and, as the child grows older, will continue to be, problematical. If I assess the damage at \$3,000 I shall not, I feel, be over-generous.

As to the father's damages, there was not much out of pocket. He did not, of course, pay the child's hospital charges from June until November, 1929. For these the hospital now counterclaims in the sum of \$480.50. The Sick Children's Hospital very generously rendered no bill for the treatment the child had there from April to November, 1930. Of course the hospital cannot be allowed anything for its bill for the treatment of the child. It was only doing what I think it was required to do by the facts of the case—it was minimising the damages for which it was liable. But the hospital had a balance of a bill against the adult plaintiff in respect of services rendered to his wife amounting to \$158.60. If I allow the father that amount by way of damages, so as to offset the hospital bill, the hospital will have no ground for complaint.

In the ordinary course the amount of the judgment in favour of the infant would be paid into court. I am unwilling to embarrass the hospital by requiring immediate payment. The judgment will bear interest from this date, and the hospital authorities will no doubt be able to arrange with the plaintiffs a basis of payment that will not embarrass the hospital too much. After counsel have conferred, they may speak to me as to the form of the judgment.

The plaintiffs are entitled to their costs, which I will fix, if both sides consent, to avoid the expense of a taxation.

[APPELLATE DIVISION.]

RE ARROW RIVER AND TRIBUTARIES SLIDE AND BOOM CO. LTD.

1931.

Constitutional Law—Treaty—Lakes and Rivers Improvement Act, secs. 32, 42—Interpretation—International Boundary Stream—Improvements—Tolls—Prohibition—"Free and Open Use"—Enjoyment of, by Citizens of United States.

Jan. 23.

The statutes of Ontario are all enacted by the Sovereign, though the advice and consent of the Legislature is necessary.

The Sovereign will not be considered as enacting anything that will conflict with his duty, unless the language of the enactment is perfectly clear and explicit, admitting of no other interpretation.

The Ashburton Treaty of 1842 was made by her Majesty and is binding on her successor, the present Sovereign, who cannot be thought of as violating his agreement with the other contracting Power; and, therefore, the Lakes and Rivers Improvement Act, R.S.O. 1927, ch. 43, must be read in such a way as to reject any imputation of breaking faith. Section 32 should be read as referring to a lake or river in Ontario, and not merely partly in Ontario, and cannot be interpreted as intended to cover the Pigeon river, which is an international boundary: see sec. 42.

The statute was not intended to and does not confer upon the company the right to build upon the bed of the Pigeon river anything which may interfere with the enjoyment of free and open use of it by the citizens of the United States.

The fixing of tolls for any part of the Pigeon river should be prohibited.

Judgment of WRIGHT, J. (1930), 65 O.L.R. 575, reversed.

AN appeal by the Pigeon Timber Company Ltd. from the order of WRIGHT, J. (1930), 65 O.L.R. 575.

October 23, 1930. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

H. F. Parkinson, K.C., for the appellant company, argued that it was entitled to the order of prohibition. As the Pigeon river was an international boundary, makers of improvements thereon did not come within the provisions of the Lakes and Rivers Improvement Act, R.S.O. 1927, ch. 43. The Arrow River company had no right under its charter to charge tolls in respect of timber or pulpwood passing down the Pigeon river. In so far as the Act purported to authorise the charging and collection of tolls for the use of such improvements, it was *ultra vires*. In the Ashburton Treaty the words "free and open" prohibit the charging or collection of tolls in respect of timber or pulpwood passing down the Pigeon river. Under sec. 32 of the Act the Arrow River company was incorporated to construct and operate works upon any lake or river "in Ontario." The Pigeon river could not be said to be "in Ontario." Reference to *Re Township of Ameliasburg v. Pitcher* (1906), 13 O.L.R. 417; *Re Royston Park Subdivision and Town of Steelton* (1913), 28 O.L.R. 629; *Merritt v.*

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Edward Bayly, K.C., and *W. B. Common*, for the Attorney-General for Ontario, said that Mr. Justice Wright had dealt very fully with the constitutional question. The legislation is *intra vires*: Clement's *Canadian Constitution*, 3rd ed., pp. 142, 143, 144. Treaties are binding in honour on countries which are parties to them, and so the Sovereign will not be considered as enacting anything that will conflict with his duty unless the language of the statute will admit of no other interpretation.

Sir William Hearst, K.C., for the Arrow River company, respondent, said he relied upon the judgment below for the reasons given therein. Reference to *Regina v. Lord Mayor of London* (1893), 69 L.T.R. 721; *Siddall v. Gibson* (1859), 17 U.C.R. 98; *In re Dyer v. Evans* (1889), 30 O.R. 637.

January 23, 1931. The judgment of the Court was read by RIDDELL, J.A.:—The Arrow River and Tributaries Slide and Boom Company was incorporated pursuant to what is now R.S.O. 1927, ch. 43, the Lakes and Rivers Improvement Act, to construct works to facilitate the transmission of timber down the Arrow river and its tributaries and “that part of the Pigeon river which is within the Province of Ontario . . .”. Having made such works on the Arrow and also on the Pigeon river on the right side, the Arrow company applied under sec. 53 of the Act to the Judge to fix the tolls to which it was entitled. His Honour proposing to fix the tolls for that part of the works which was in the Pigeon river, the appellants, the Pigeon Timber Company, objected that no tolls could be collected for that part of the work. The objection being overruled, application was made to Mr. Justice Wright for prohibition. That learned Judge refused the application, and an appeal is now made to us.

We are not concerned to inquire whether prohibition is the proper remedy, all parties before us proceeding upon the hypothesis that, if the Arrow company had no right to charge tolls for the works on the Pigeon river, the appeal should succeed.

The objection of the appellant is substantially that, owing to the Ashburton Treaty of 1842, this river was to be “free and open” for the nationals of the two contracting parties, Britain and the United States.

The real argument based upon this Treaty has been misapprehended, the learned Judge disposing of the matter on the proposition, which is undoubted law, namely, that, in British countries, treaties to which Britain is a party are not as such binding upon the individual subjects, but are only contracts binding in

honour upon the contracting States. He consequently held that the Arrow company need not pay any attention to the Treaty.

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The real argument is that the Treaty was made with her Majesty, and is binding in honour upon her Majesty's successor, his present Majesty, as it was upon his predecessor. Consequently, the Sovereign will not be considered as enacting anything that will conflict with his plain duty, unless the language employed in the statute is perfectly clear and explicit, admitting of no other interpretation. I speak of his Majesty enacting, because, although, by reason of our system of Responsible Government, statutes are approved by the representatives of the people, nevertheless every Ontario Act begins, "*His Majesty*, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts" The statutes are all enacted by his Majesty, though the advice and consent of the Legislature is necessary under our Constitution.

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The King cannot be thought of as violating his agreement with the other contracting Power; and, if the legislation can fairly be read in such a way as to reject any imputation of breaking faith, it must be so read.

That the works placed on the bed of the Pigeon river must necessarily interfere with the free navigation of the Pigeon river on the Ontario side is not disputed; consequently, the terms of the Treaty are set at naught.

The company to be incorporated under the Act in question was to be so incorporated for the purpose of "acquiring or constructing and maintaining and operating works upon any lake or river in Ontario:" sec. 32. This may well be read as meaning what I think it says, i.e., the lake or river is to be "in Ontario," not "partly in Ontario." That it cannot be interpreted as intended to cover such a river as the Pigeon river, is, I think, indicated by sec. 42, giving the company the right to expropriate any land requisite for the undertaking.

To put it simply, placing his Majesty in the position of an honourable man, who had agreed that another should have the right to pass over his land under the water, could it be even imagined that he would either himself build such structures as are in question here or authorise another to do so? To my mind, to ask this question is to answer it.

I think that the statute was not intended to and does not confer upon this company the right to build upon the bed of the Pigeon river anything which may interfere with the enjoyment of free and open use of it by the citizens of the United States. That

App. Div. what the Arrow company has done has such effect is perfectly
 1931. obvious from the evidence.

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I would allow the appeal with costs here and below, and prohibit the fixing of tolls for any part of the Pigeon river.

Appeal allowed.

Riddell, J.A.

[APPELLATE DIVISION.]

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LECOMTE V. BELL TELEPHONE CO. OF CANADA.

Jan. 23.

Parties—Addition of New Defendant upon Application of Original Defendant in Action for Negligence—Order Granted upon Terms as to Costs — Negligence Act, 1930, sec. 6 — Plaintiffs Declining to Claim against Added Defendant—Absence of Power to Compel them to Claim.

The plaintiffs, the widow and children of L., brought this action, under the Fatal Accidents Act, R.S.O. 1927, ch. 183, to recover damages arising from the death of L., caused, as alleged, by the negligence of the defendant company. After the delivery of the statement of claim, the defendant company applied to a Local Judge for and obtained an order under the Negligence Act, 1930, 20 Geo. V. ch. 27, adding the Corporation of the City of Ottawa as a party. The plaintiffs complied with the order by amending the writ and statement of claim and serving them on the city corporation; but did not insert a claim for relief against the city corporation:—

Held, that the plaintiffs could not be compelled to amend by claiming against the corporation.

Held, also, that, as it appeared that the corporation might be at least partly responsible for the damages claimed, the order making it a party should not be set aside, but should be varied by the addition of a term that the defendant company should be responsible for all the costs to which the plaintiffs should be put or should be compelled to pay by reason of the addition of the corporation.

Section 6 of the Act considered.

AN appeal by the defendant company from an order of RANNEY, J., in Chambers, dismissing the defendant company's appeal from an order of the Local Judge at Ottawa dismissing a motion for an order requiring the plaintiffs to amend the writ of summons and statement of claim by making a claim against the Corporation of the City of Ottawa, which had been added as a party defendant by an order of the Local Judge made upon the application of the defendant company, under the Negligence Act, 1930, 20 Geo. V. ch. 27.

There was also an appeal by the defendant company from the order of RANNEY, J., setting aside the order adding the city corporation as a party defendant.

November 5, 1930. The appeals were heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

Redmond Quain, for the appellant company, argued that the order adding the city corporation as a party defendant should be restored, as it might be found that the city corporation was wholly or partly responsible for the damages claimed. The learned Judge below erred in assuming that, if the appellant company brought in the city corporation as a third party, there would be an action "founded upon the fault or negligence of two or more persons" so as to bring the defendant and the third party within the Negligence Act, 1930, 20 Geo. V. ch. 27, sec. 3, and enable the Court to determine the degree in which each of such parties was negligent. The plaintiffs should be compelled to claim against the city corporation.

F. B. Proctor, K.C., for the city corporation, contended that it should not be made a party defendant. There could be no contribution between joint tort-feasors: Halsbury's Laws of England, vol. 27, p. 489; *Palmer v. Wick and Pulteneytown Steam Shipping Co. Ltd.*, [1894] A.C. 318; *Sutton v. Town of Dundas* (1908), 17 O.L.R. 556, 564; *René v. Carling Export Brewing and Malting Co. Ltd.* (1927), 61 O.L.R. 495; *Paul v. Chandler & Fisher Ltd.* (1923), 54 O.L.R. 410; *The Koursk*, [1924] P. 140. The defendant had a perfect remedy under the third party Rule.

Wilfrid Heighington, for the plaintiffs, respondents, argued that the city corporation should not be made a party defendant unless on the terms that the defendant company should be responsible for all costs to which the plaintiffs should be put by the addition of the city corporation. The plaintiffs could not be compelled to claim against the city corporation.

January 23. The judgment of the Court was read by RIDDELL, J.A.:—These two appeals were argued together, as they are intimately connected. The facts are very simple and the whole difficulty is found in the application of the revolutionary (and, in my opinion, very valuable) Act of last session, viz. (1930) 20 Geo. V. ch. 27 (Ont.), "The Negligence Act, 1930."

The plaintiffs, the widow and children of the late Eugene Lecomte, brought this action against the Bell Telephone Company, charging that the death of the said Eugene Lecomte was caused by the negligence of the company, and suing under the Fatal Accidents Act, R.S.O. 1927, ch. 183, for damages. After a statement of claim had been delivered, the defendant company applied to the Local Judge at Ottawa for an order directing that the Corporation of the City of Ottawa should be added as a party, basing the application on the Negligence Act referred to above.

The Local Judge on the 11th August, 1930, made an order directing that the city corporation should be added as a party, and

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the writ of summons and statement of claim amended accordingly, the city corporation to be served with copies of the writ and statement of claim; costs in the cause. No further or other provision was made in the order for the protection of the plaintiffs or otherwise.

The plaintiffs complied with the order by amending the writ and statement of claim; but no claim was made in the statement of claim for relief against the city corporation.

The defendant the Bell Telephone Company moved to compel the plaintiffs to amend by claiming against the Corporation of the City of Ottawa; this motion was dismissed, as was an appeal from the dismissal, at the Weekly Court sittings at Ottawa, by Mr. Justice Raney. An appeal from the dismissal by Mr. Justice Raney is one of the appeals to us which now fall to be decided.

Leaving that appeal for the moment, the second appeal arises under these circumstances. The city corporation moved against the order adding it as a party; this motion was allowed by Mr. Justice Raney; and the appeal from this order is the second of the appeals.

The statute in question is very explicit, sec. 6 reading: "Whenever it appears that any person not already party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant upon such terms as may be deemed just."

It was made to appear that the city corporation may be at least partly responsible for the damages claimed, and I can see no possible reason for failing to give effect to the precise words of the Act, and, consequently, the city corporation should, if the Bell Telephone Company so desires, be added as a party defendant. This should, however, be on proper terms, and admittedly the terms should be that the Bell Telephone Company shall be responsible for all the costs to which the plaintiffs should be put, or be compelled to pay, occasioned by the addition of the city corporation. With this term, the order adding the city corporation should be reinstated, and the city corporation should pay forthwith the costs here and below of their attempt to set it aside.

As to the appeal to compel the plaintiffs to claim against the city corporation. I can find no authority, statutory or otherwise, which would justify the Court in compelling any plaintiff to claim anything but what he chooses to claim—he is *dominus litis*, master of his own litigation, and we should not interfere with his discretion as to the person or persons he will sue. What may be the result at the trial, if any, of his refusal to sue the city, as to costs or otherwise, we need not consider.

Neither, as I am convinced, are we called upon to decide as to the exact effect of sec. 6, or as to the present right of contribution between co-tort-feasors, or whether there is any difference between the English and the Scottish rules of law in that regard. Some or all of these questions may require to be decided by the trial Judge according to the result of the trial, but, at present, upon this application we have no concern with them.

As to the supposed difficulties in the way, I am wholly unable to see any. If the Bell Telephone Company sets out in its statement of defence its contention against the city, the city, no doubt, will counter with its side, and the whole matter may be fought out at the trial, when, after the facts are determined, the proper judgment will be entered as to costs as well as damages.

The Bell Telephone Company should pay the costs of the application before Mr. Justice Raney in this part of the action against it, and of the appeal.

Order accordingly.

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[APPELLATE DIVISION.]

ANDERSON V. TOWNSHIP OF AMELIASBURG.

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Jan. 23.

Res Judicata—Summary Dismissal of Action—Identity of Cause of Action with that in Former Action between same Parties—Doubt as to—Whether Reasonable Cause of Action Disclosed—Appeal from Order of Dismissal—Action Allowed to Proceed to Trial with Questions Raised by Defendant Left Open.

In this action the plaintiff claimed from the defendant corporation damages for permitting a road in the township to be obstructed, thereby preventing customers from going to and from his hotel, whereby he was prevented from operating his hotel and had suffered special damage:—

Held, upon appeal from the order of a Judge summarily dismissing the action upon the ground that the issues therein had been determined by a Court of concurrent jurisdiction in an earlier action between the same parties, that the identity of the issues in the two actions was not clear upon the material before the Court; and, therefore, the order should be set aside and the action allowed to proceed to trial, the question of *res judicata* being left open.

Per RIDDELL, J.A.:—It was impossible to say that, if the allegations of the statement of claim were true, the plaintiff had not a right of action for his special damage, of a kind totally different from that (if any) suffered by the public at large; and the defendant corporation's contention that no reasonable cause of action was disclosed should also be left open.

APPEAL by the plaintiff from an order of ROSE, C.J., of the 6th October, 1930, dismissing the action on the ground that the issue therein had been determined by a court of competent jurisdiction in a prior action between the same parties.

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November 20, 1930. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, and FISHER, JJ.A.

H. W. Cavell, for the appellant, argued that the matters in issue in this action with reference to the damages claimed by the plaintiff are distinct from the matters adjudicated upon in the trial of an action between the same parties at Cobourg in June, 1926, and therefore the principle of *res judicata* does not apply: 4 C.E.D. (Ont.) 368; *Barber v. McCuaig* (1900), 31 O.R. 593. The statement of claim discloses a reasonable cause of action which is maintainable by the plaintiff, he having sustained special damage.

R. S. Robertson, K.C., for the defendant corporation, respondent, contended that the cause of action was the same as that in the action of 1926.

January 23. LATCHFORD, C.J.:—This appeal is from the order of Rose, C.J., of the 6th October, 1930, dismissing the action with costs, on the ground that the issue in question had been determined by a court of concurrent jurisdiction in a prior action between the same parties.

A careful scrutiny of the plan filed in this action and a comparison of pleadings in both actions lead me to have misgivings as to the identity of the causes of action in the two cases.

The principle applicable in cases like this was pithily stated by the Chief Justice of the Common Pleas, Sir William de Grey, in the *Duchess of Kingston's Case* (1776), 34 H. L. Jo. 665; 2 Sm. L.C., 13th ed., 644, at p. 645:—

“The judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court.”

In *Mackintosh v. Smith and Lowe* (1865), 4 Macq. H.L. 913, Lord Chelmsford observed, at p. 924: “The judgments of courts of concurrent jurisdiction are evidence only where the very same matter comes distinctly in issue between the same parties.”

It may well be that the matters in issue here are the very same as those disposed of adversely to the plaintiff in the previous action; but, upon the material before this Court, the identity of the two causes of action is, in my opinion, uncertain. The action should be allowed to proceed, and the order appealed from set aside with costs to the plaintiff in any event, to be set off against any costs he may be ordered to pay should his action be dismissed.

My opinion is not to be considered as determining that the principle of *res judicata* does not apply, but merely that the point is at present in doubt.

RIDDELL, J.A.:—An appeal by the plaintiff from the order of the Chief Justice of the High Court dismissing the action on the grounds of *res adjudicata*.

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The writ in the action was tested the 30th May, 1930. The statement of claim sets out that the plaintiff bought certain lands in the township in 1921; that in 1816 a road was laid out through these lands, which became and continued to be a common and public highway; that the defendant township corporation was and is responsible for keeping this road in repair and free from obstruction; that he opened a summer hotel on his said land in 1922, the patrons of which used the said road, and he netted a large income from his hotel; that early in the season of 1923 the defendant corporation permitted one W. to obstruct the road by locking gates or other barriers across it; and permitted it to be so obstructed until the present time; that the plaintiff is thereby prevented from operating his hotel; the customers being prevented from going to and from it, and has suffered damage thereby. He claims \$75,000 damages, with costs, and adds a general claim for "such further and other relief as to this Honourable Court may seem proper in the premises."

This statement of claim being served on the 15th September, 1930, the defendant corporation without delay served notice of motion "for an order staying proceedings in the action on the ground that the matters in question . . . the subject of another action," were finally disposed of in that action by judgment, on the 15th June, 1926; a supplementary notice of motion was served for the same purpose, upon the ground that no reasonable cause of action was disclosed by the statement of claim. Both grounds were urged before the learned Chief Justice; and he, without passing upon the latter and supplementary ground, dismissed the action on the ground of *res adjudicata*.

As to the "demurrer" not dealt with by the learned Chief Justice, I think it impossible, in the present state of the authorities, to say that, if the allegations of the statement of claim are true, the plaintiff had no right of action for his special damage, of a kind totally different from that, if any, suffered by the public at large.

We should not on a motion such as this, in which the full determining facts are not disclosed, peremptorily shut off the plaintiff from any relief to which he is entitled. If and when all the facts are disclosed by evidence or admission, the law can be applied, as fitted to the particular facts. We, by declining to give effect to the "demurrer," do not reverse the Court below, but, as was done there, leave the question open.

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As to the *res adjudicata*, I am unable to see that the defendant corporation has made it clear that the question in the present case was up for decision in the former action.

It is the modern doctrine that not only the pleadings are to be looked at but all the proceedings in the case relied upon as *res adjudicata*: 4 C.E.D. (Ont.) 368, and cases cited, e.g., *Barber v. McCuaig*, 31 O.R. 593, "the reasons for judgment, the grounds of the decision," and the like. See also *Pirie & Stone v. Parry Sound Lumber Co.* (1907), 11 O.W.R. 11; *Re Ellis and Town of Renfrew* (1910), 21 O.L.R. 74. What is the real question decided can be gathered from available sources, and the matter of actual pleading is not of so much importance.

Looking at the pleadings in the two actions, I think that, at the very least, it is not made to appear clearly that the two are identical; and this, I think, it was incumbent upon the defendant to prove with reasonable clearness. The question may be raised by proper pleading by the defendant, if so advised, as we do not decide that the two causes of actions are not the same, but only that this has not been proved.

I think that the order must be set aside and the parties left to determine their rights in the usual way.

As the plaintiff was forced to come to this Court for relief, I think he should have the costs of the appeal and in the Court below, in any event of the cause.

MASTEN, J.A.:—The hearing of this appeal consumed much time, and I regret to say that I derived little benefit from the elaborate argument addressed to us. I have a strong suspicion that the new aspect and the new evidence which the plaintiff here seeks to bring forward for trial might have been presented before Meredith, C.J.C.P., under the issues raised on the record which was before him. None the less the confused and confusing material which is before us on this appeal is such that I cannot be positively satisfied that this action ought to be nipped in the bud. I would, therefore, on that ground alone, allow the appeal, set aside Chief Justice Rose's order, and refer the motion to the trial Judge unembarrassed by any expression of opinion on the question of *res adjudicata*. Costs here and below to the plaintiff in any event.

FISHER, J.A., agreed with LATCHFORD, C.J.

Appeal allowed.

[APPELLATE DIVISION.]

HOPPE V. MANNERS.

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Jan. 23.

Fixtures—Chattels Purchased under Conditional Sale Contract and Affixed to Freehold—Default—Claim of Vendor to Remove—Conditional Sales Act, R.S.O. 1927, ch. 165, sec. 8—Purchase of Freehold by Bonâ Fide Purchaser for Value without Actual Notice of Contract—Protection of—Benefit of Land Titles Act, R.S.O. 1927, ch. 190, sec. 41—Injunction.

The defendant was the vendor under a contract with L. for the sale to L. and the installation in a dwelling-house in course of construction upon lands of L. of goods which comprised the usual plumbing equipment throughout the house. The price, \$840, included the services and labour involved in the installation. The agreement was in writing, and was intended to be a contract of conditional sale under the Conditional Sales Act, and was duly filed as required by the Act. The goods were delivered and installed and the work done by the defendant, but the price was not fully paid by L. In October, 1927, L. transferred the lands to the plaintiff by an instrument under the Land Titles Act. The defendant had taken no steps to enforce his rights under the agreement with L. The plaintiff purchased in good faith, for value, and without actual notice of the defendant's contract. It was not proved that the defendant had registered his agreement or any caution in the Land Titles office. The defendant claimed to be entitled, by virtue of sec. 8 of the Conditional Sales Act, to enter upon the lands and remove the things which he had sold to L., unless the plaintiff paid him the balance owing by L.; and the plaintiff by this action sought to restrain the defendant from doing so:—

Held, that sec. 8 does not exclude the operation of those provisions of the Registry and Land Titles Act designed for the protection of *bonâ fide* purchasers for value without notice.

The section does not say that the goods, having been affixed to the realty, are, nevertheless to be and remain chattels; and the effect of the words "they shall remain subject to the rights of the seller . . . as fully as they were before being so affixed" is merely to preserve the seller's right to what were at one time goods, but which have in fact become part of the realty.

If a vendor of chattels wishes to protect himself against subsequent purchasers he must register his conditional sale agreement in the registry or Land Titles office.

Collis v. Carew Lumber Co. Ltd. (1930), 65 O.L.R. 520, distinguished. As against the plaintiff, therefore, the defendant had no lien upon the lands (including the things which he desired to remove); and the plaintiff was entitled to the injunction sought.

AN appeal by the plaintiff from the judgment of the County Court of the County of York (LEE, Jun. C.J.), dismissing with costs an action for an injunction restraining the defendant from entering certain premises and repossessing goods used in the construction of a heating plant and plumbing equipment, and directing judgment to be entered for the plaintiff upon his counterclaim with costs.

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September 26 and 27, 1930. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

John Jennings, K.C., for the appellant, argued that the contract in question was not for the sale of goods, but for the doing of work and furnishing material, and was therefore not within the contemplation of the Conditional Sales Act, R.S.O. 1927, ch. 165. Since the contract does not provide that the ownership shall be retained by the vendor, it is not a conditional sale agreement within sec. 2, subsec. 1, of the statute. The appellant comes within the provisions of sec. 2, subsec. 4, of the Act. The equipment was delivered by the vendor to a builder with the knowledge that it would be resold with the houses in the ordinary course of his business. In such circumstances it may properly be described as building material. Reference to *Agricultural Development Board v. De Laval Co. Ltd. and Brown* (1925), 58 O.L.R. 35; *Harris v. Tong* (1930), 65 O.L.R. 133; *Hojem v. Marshall* (1921), 20 O.W.N. 63; *Collis v. Carew Lumber Co. Ltd.* (1930), 65 O.L.R. 520; *Dominion Lock Joint Pipe Co. Ltd. v. Township of York* (1929), 64 O.L.R. 365; *Hobson v. Gorringer*, [1897] 1 Ch. 182.

A. C. Heighington, K.C., for the defendant, respondent, contended that the Conditional Sales Act protects a purchaser of chattels but not a purchaser of realty. In *Collis v. Carew Lumber Co. Ltd.*, subsec. 4 of sec. 2 is interpreted as applying only to the resale of the chattel itself, and not after it has become affixed to realty. Reference to *Liquid Carbonic Co. Ltd. v. Rountree* (1923), 54 O.L.R. 75, and cases there cited; *Polson v. Degeer* (1886), 12 O.R. 275, at p. 280; *Joseph Hall Manufacturing Co. v. Hazlitt* (1885), 11 A.R. 749. Goods need not be sold under a conditional sale agreement at all, if under the agreement between the parties the chattels do not become part of the realty. Section 8 has, therefore, a wider application than to sales made under the Act: *Dominion Lock Joint Pipe Co. Ltd. v. Township of York*, 64 O.L.R. 365. The expression "right and title of possession" in the agreement in question should be reasonably interpreted as a reservation of ownership: *Polson v. Degeer* (*supra*). The goods in question are not building materials: *Collis v. Carew Lumber Co. Ltd.* (*supra*); *Re Canadian Camera Co., A. R. Williams Co.'s Claim* (1901), 2 O.L.R. 677. The combined claim for labour and materials does not affect the lien created by the conditional sale agreement. The circumstances of this case bring it completely within the provisions of sec. 8.

January 23, 1931. ORDE, J.A.:—The defendant was the vendor under a contract with one Larkin for the sale to Larkin, and the installation in a building then under construction or about

to be constructed upon lands belonging to Larkin, of certain goods. The goods comprised the usual plumbing equipment in a bath-room consisting of the bath, basin, etc., and also two laundry tubs, and a hot-water boiler with all the taps, water-pipes, vent-pipes, etc., connected therewith, and also a hot-water boiler and radiators throughout the house. The price, \$840, included the services and labour involved in the installation of the goods in the building.

The agreement was in writing and was intended to be a contract of conditional sale, within the meaning of the Conditional Sales Act, R.S.O. 1927, ch. 165, and was duly filed as required by the Act. Whether or not the contract came within or complied with the requirements of the Act was one of the questions raised upon the argument.

The goods were delivered and installed and the work done by the defendant under the contract, but the contract price was not fully paid by Larkin.

On the 3rd October, 1927, Larkin agreed to sell the lands in question to the plaintiff for valuable consideration, and on the 21st October, 1927, Larkin transferred the lands to the plaintiff under the Land Titles Act. The defendant had taken no steps to enforce his rights under the alleged conditional sale agreement, and there can be no doubt that the plaintiff purchased in good faith, for value, and without any actual notice of the defendant's contract.

It is not proved or suggested that the defendant had registered his agreement or any caution in the Land Titles office; so that the plaintiff is entitled to whatever benefit the absence of any such record in the Land Titles office may afford him.

Counsel for the plaintiff raised certain points as to the validity of the contract between the defendant and Larkin as a conditional sale agreement because of its form and failure, as alleged, to comply with some of the provisions of the Conditional Sales Act. But the main argument, assuming the contract to be within the Act, centred upon the bearing of sec. 8 upon the respective rights of the defendant as the conditional vendor of the goods and of the plaintiff as a *bonâ fide* purchaser of the lands without notice of the defendant's contract.

Section 8 is as follows: "Where the goods other than building material have been affixed to realty they shall remain subject to the rights of the seller or lender as fully as they were before being so affixed, but the owner of such realty or any purchaser or any mortgagee or other encumbrancer thereof shall have the right as against the seller or lender or other person claiming

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through or under him to retain the goods upon payment of the amount owing on them."

The defendant claims to be entitled, by virtue of this section and of the terms of his contract, to enter upon the lands and to remove the things which he sold to Larkin, even though it may be necessary for such purpose to tear out the piping and plumbing and in so doing to damage or destroy the remaining portions of the building, unless the plaintiff pays him the balance owing by Larkin. The claim to be thus entitled to enter and to detach the things in question from the fabric of the building suggests the answer which Portia gave to Shylock when he was preparing to remove his pound of flesh: —

"Therefore prepare ye to cut off the flesh,

"Shed thou no blood; nor cut thou less nor more

"But just a pound of flesh; if thou cut'st more

"Or less than a just pound . . .

" . . . nay, if the scales do turn

"But in the estimation of a hair,

"Thou diest and all thy goods are confiscate."

But, however much the difficulty suggested by Portia may appeal to the man in the street, or rather in the pit, as a piece of dramatic justice, there are many answers which competent counsel for Shylock might have advanced in support of his claim for specific performance of his contract.

The plaintiff says, in answer to the defendant's contention, that he is entitled, as a *bonâ fide* purchaser for value without notice, to the protection of the Land Titles Act, and particularly of sec. 41 thereof, which upon registration of the transfer from Larkin gave him an absolute estate in fee simple, subject only to the encumbrances and liabilities mentioned in that section.

The defendant rests his claim mainly upon sec. 8, above quoted, and argues that its effect is to take the things claimed out of the operation of the Registry Act or the Land Titles Act even as against a *bonâ fide* purchaser for value without notice. In other words, that the things are to be treated as if they had never entered into the construction of the building at all and as against all the world (except perhaps the tax-collector), so far as the conditional vendor's rights are concerned, as chattels belonging to him.

I can see no escape from the conclusion that, if there is no other law applicable to the determination of the rights of the respective parties, that is the effect of sec. 8, especially since the recent decision of the First Divisional Court in *Collis v. Carew Lumber Co. Ltd.*, 65 O.L.R. 520. But for that decision I should

have been inclined to hold that things of this character, which are incorporated in the very being of a dwelling house, are building materials and so excluded from the operation of the section. That construction would restrict sec. 8 to things brought in and affixed to an already completed building and would have left the vendor in a case like this to his remedies under the Mechanics Lien Act. It will be startling to find that this section, if it has the effect contended for, may entitle an unpaid vendor of the plumbing, or the electric wiring, or the elevators, in a large modern hotel, to enter and tear the things out from basement to roof as against a purchaser who never heard of his claim.

But is sec. 8 to be so interpreted as to take the transaction out of the operation of all the existing laws framed for the protection of purchasers of real property? It is, of course, elementary that the intention of the Legislature must be found in the language of its enactments, but I wonder, if the members of the Legislature had been told that the possible result of the passage of this section would be to render it unsafe hereafter when buying a house to trust to the Registry Act, and that a purchaser might find himself saddled with a heavy liability to some one of whom he had never heard, whether they would have passed the section in its present form.

The *Collis* case was relied upon by counsel for the defendant as having settled this question, but it is clear that the judgment was confined solely to the question of the validity of the vendor's claim to the furnace: see p. 523. The defendants had acquired the lands from the builder of the houses, and it was stipulated that the defendants were to pay all outstanding claims against the property. The defendants did not set up the protection afforded by the Registry Act at all, and the point was not in issue. I do not think that the *Collis* case has any application to the point now under discussion.

I think a careful examination of the words of the section will lead to the conclusion that they do not exclude the operation of those provisions of the Registry Act and Land Titles Act designed for the protection of *bonâ fide* purchasers for value without notice. The important part of the section is embodied in the words "they shall remain subject to the rights of the seller or lender as fully as they were before being so affixed." Now it is to be observed that the section does not say that the goods having been affixed to the realty are, nevertheless, to be and remain chattels, and the effect of the words I have quoted is, in my judgment, merely to preserve the seller's or lender's right to what were at one time goods, but which have in fact become part of the realty. They are no longer

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goods, but the title of the seller is nevertheless to remain vested in him.

That being the case, can there be any reason why the seller in respect of that title should be placed in a position superior to that of any other owner of an interest in realty? It is just as if the owner of the land had conveyed to the vendor of the goods an interest in so much of the realty. The title to that interest so acquired is complete as between the parties to the transaction, but the mere establishment, even by statute, of that title ought not, unless the statute expressly so provides, to abrogate the strict requirements of the Registry and Land Titles Acts designed to protect *bonâ fide* purchasers against unregistered transactions. In my opinion, these requirements are in no way affected by sec. 8, and if a vendor of chattels which are to become part of the realty wishes to protect himself against subsequent purchasers he must register his conditional sale agreement in the registry office, or Land Titles office, as the case may be.

It was suggested during the argument that two persons might agree that a chattel should remain a chattel even if affixed to the realty. I know of no authority for this. I think that sometimes there is a confused idea that because a fixture, as between certain parties, may be detached from the freehold and be removed, it is therefore a chattel. But the law affecting fixtures is based upon the fact that as a matter of law a fixture is always part of the land. If fixtures were not land, but were simply chattels, notwithstanding their attachment to the realty, there would be no foundation for the development of any set of principles governing their removal. It is the fact that a fixture is part of the realty that causes the difficulty. Once a chattel is attached to the realty in such a way as to become a fixture, then it is land and no longer a chattel. By some agreement it may, nevertheless, belong to and be removable by some person who does not own the land to which it is affixed, but the title of the owner of the fixture, being realty, must be governed, as all other titles to realty are governed, by the Registry and Land Titles Acts.

In my opinion, the appeal ought to be allowed, and judgment entered for the plaintiff declaring that as against the plaintiff the defendant has no lien upon the lands in question (including, of course, the things which the defendant desires to remove), and an injunction, as asked, restraining the defendant from entering upon the lands and removing the things in question, and the costs of the action.

LATCHFORD, C.J., agreed with ORDE, J.A.

RIDDELL, MASTEN, and FISHER, J.J.A., agreed in the result.

Appeal allowed.

[APPELLATE DIVISION.]

UNITED CIGAR STORES LTD. v. BULLER AND HUGHES.

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Landlord and Tenant—Lease of Store at Annual Rental Payable Monthly—Agreement for Proportionate Reduction of Rent in Event of Damage by Fire—Occurrence of Fire—Damage to Tenant's Goods—Neglect of Landlord to Repair—Untenantable Premises, Having Regard to Nature of Goods Sold—Evidence—Acceptance of Testimony of Witness not Cross-examined—Right of Tenant (Defendant) to Set up Rights Arising after Action Begun—Proportionate Reduction of Rent—Premises Used for Storage—Occupation Rent.

The plaintiff company leased to the defendant the half of a shop, in which the defendant carried on the business of selling *lingerie* and other articles of ladies' attire. The other half was occupied by the plaintiff company for its business; the two halves being separated by a partition, making essentially separate establishments. The lease contained a clause providing that in case the demised premises should at any time during the term be damaged by fire the lessee should give immediate notice thereof to the lessor, who should thereupon cause the same to be repaired, and a proportionate reduction of rent should be allowed the lessee for the time occupied in repairing such part or parts "as may be rendered untenable and incapable for use and occupancy by the lessee." The rental was expressed to be "the yearly rental of \$2,100" during part of the term and \$2,400 "during the remainder of the term, payable \$200 . . . monthly, in advance, on the first day of each and every month." The defendant paid the instalments of rent until that due on the 1st May, 1929, the term ending on the 30th August, 1929. On the 18th May, 1929, a fire took place in the part occupied by the plaintiff company, from which smoke penetrated to the defendant's part, disfiguring the walls and ceiling and injuring the defendant's stock-in-trade. On the 21st May the defendant notified the plaintiff company, in writing, of the fire, saying that "the store would be unfit for use until the old paper containing the smell of smoke was taken off and new paper put on and the store redecorated . . . until that is done, I will not pay rent." The plaintiff company did not repair; and the defendant did nothing, but remained in legal tenancy of the premises till the end of August, occupying and using the premises for the storage of certain merchandise which it was not convenient for him to remove to the new premises to which, before the fire, he had arranged to move. This action was for \$400, the amount of rent in arrear for May and June, 1929. The defendant paid into court \$118.50 as the rent for the first 18 days of May, 1929, and \$21 costs of the action:—

Held, that the rental was \$2,400 *per annum*, there was no rental for the month or for any month, the several monthly payments stipulated for being instalments of the yearly rental of \$2,400.

Held, also, that the damage, such as it was, was caused by fire; and that, having regard to the nature of the goods dealt in by the defendant, the premises were so injured by fire as to render them "untenantable and incapable for use and occupancy by the lessee."

Proudfoot v. Hart (1890), 25 Q.B.D. 42, and *Moxon v. The Marquis Townshend* (1886), 2 Times L.R. 717, followed.

The only witness who gave evidence as to the suitability of the premises after the fire to carry on the business was the defendant him-

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self, who swore specifically that they were not suitable, and he was not cross-examined:—

Held, that if in the course of a trial it is intended to suggest that the witness is not speaking the truth upon a particular point, his attention should be directed to the fact by cross-examination shewing that that imputation is intended to be made, so that he may have an opportunity of making any explanation which is open to him, unless it is otherwise clear that he had had full notice beforehand of an intention to impeach the credibility of his story or the story is of an "incredible" or romancing character; and the defendant's evidence should be accepted.

Browne v. Dunn (1893), 6 The Reports 67, applied.

There was nothing in the defendant's course of action which reduced or modified his rights under the agreement; he had the right to say that so long as the premises were left unrepaired his rent should be proportionately reduced; nor had his intention to move any influence on his rights.

The defendant was in default in not paying the \$200 instalment of rent due on the 1st May; but the defendant could set up rights extended by events *post facto*; and so, at the time of the trial, the state of disrepair having continued until the expiration of the tenancy, the reduction of rent for that period had come into effect; and the plaintiff company was obligated to reduce its rent proportionately, so that it could claim only an amount proportionate to the time of useful occupation; and that was the amount paid into court. As the defendant did in fact continue to occupy the premises, he should be charged with an occupation rent.

AN appeal by the defendants from the judgment of the County Court of the County of Middlesex (MACBETH, Co.C.J.), in favour of the plaintiff company for the recovery of \$400 and costs in an action for rent of premises in the city of London, Ontario.

The County Court Judge gave reasons for his decision (after setting out the facts) as follows:—

Any provision relieving a tenant from payment in case of fire must be found in the lease itself—in other words, a tenant must pay rent as reserved notwithstanding damage to or destruction of buildings on the demised premises, unless by the terms of the demise some provision be made in such case for suspension of rent or surrender of the term.

In the present case, the lease does not contain covenant numbered 11 in the schedule to the Act respecting Short Forms of Leases—but there is a proviso in these words:—

"Provided and it is hereby agreed that in case the premises hereby demised, or any part thereof, shall . . . be damaged by fire, the lessee shall give immediate notice thereof to the lessor, who shall thereupon cause the same to be repaired, and a proportionate reduction of rent shall be allowed the lessee for the time so occupied in repairing such part or parts of said demised premises as may be rendered untenable and incapable (*sic*) for use and occupancy by the lessee."

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Assuming that there was some damage to paper and paint which under the above proviso the lessor should have caused to be repaired, it is reasonably clear that the lessor did not think so. It did not make any repairs and maintained an absolute silence. Then, under the circumstances, the tenant should himself have repaired at the expense of the landlord, for he was bound to minimise his loss. See *Amell v. Maloney* (1929), 64 O.L.R. 285, and cases there cited. And this should apply peculiarly to the present case, where the demised premises were of considerable value, and a fraction of one month's rent would have made good any damage for which the tenants now claim to hold him responsible. There was no suspension of the rent, except for the time occupied by the landlord in repairing, and, if the landlord did not repair, then the tenant should have done the work himself, and claimed damages for breach of the landlord's agreement.

There is no counterclaim in the present action for such breach of the landlord's agreement.

As I have already said, the tenant kept possession of the demised premises and did not remove his goods until the end of August. If I am right in my opinion, he owes now for the rent of July and August, and if he has any claim for breach of the landlord's agreement to repair, he may still press it.

It may be noted that the lessor's covenant to repair damage by fire, part of which I have already quoted, is much qualified by the latter portion of the covenant—which I did not extract.

The lessor is not bound to repair for the lessee: (1) if he decides to rebuild; (2) or to exercise any option to terminate the head lease in case of fire; or (3) in case the head landlord shall terminate the head lease.

In such case, the defendant's lease shall cease, etc.

October 7, 1930. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

F. W. Gladman, for the appellants, argued that the premises were by the fire "rendered untenable and incapable for use and occupancy by the lessee," and the tenant had the right to say that, so long as the premises were left unrepaired, his rent should be proportionately reduced. The learned trial Judge dealt with the case as if the tenant were suing for breach of the covenant to repair, whereas the action was brought by the landlord for rent, which, by the terms of the lease, was not payable, owing to the landlord's neglect to carry out his covenant to repair.

R. S. McLaughlin, for the plaintiff company, respondent, relied on the reasons of the learned County Court Judge, and cited in support of his argument *Amell v. Maloney*, 64 O.L.R.

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285; *Ideal Phonograph Co. v. Shapiro* (1920), 48 O.L.R. 618; *Brown v. Trustees of the Toronto General Hospital* (1893), 23 O.R. 599. The damage to the shop was not caused by fire, within the meaning of the lease, and, in any event, the premises were not so injured as to be "untenantable."

Gladman, in reply, pointed out that the cases cited on behalf of the respondent company would be applicable only if the tenant were suing for breach of a covenant to repair.

January 23, 1931. RIDDELL, J.A.:—An appeal by the defendants from the judgment of the County Court of the County of Middlesex.

There are certain special circumstances connected with the case which need not be entered into, by reason of the sensible position taken by all parties; the case is one of landlord and tenant, the landlord agreeing, under certain stated circumstances, to repair and that no rent should be payable until the repair should be completed. The tenant alleges that the circumstances have arisen and that his rent should be reduced accordingly; this the landlord disputes, and has succeeded in convincing the learned County Court Judge to give judgment in his favour.

The clause in question reads:—

"Provided and it is hereby agreed that in case the premises hereby demised, or any part thereof, shall at any time during the term hereby granted be damaged by fire, the lessee shall give immediate notice thereof to the lessor, who shall thereupon cause the same to be repaired, and a proportionate reduction of rent shall be allowed the lessee for the time so occupied in repairing such part or parts of said demised premises as may be rendered untenable and incapable for use and occupancy by the lessee . . ."

The rental was thus expressed, "the yearly rental of \$2,100" during part of the term, not of importance in this case, and \$2,400 . . . during the remainder of the term, payable \$200 . . . monthly, in advance, on the first day of each and every month."

Hughes paid the instalments of rent until that due on the 1st May, 1929, the term of the lease ending on the 30th August, 1929.

He was and is considered by all parties "the lessee:" he was in actual possession and enjoyment of the premises in question, carrying on there his business as vendor of ladies' *lingerie* and articles of that character. The premises were the south half of a shop, the north part of which was occupied by the plaintiff company for its business; the two halves were separated by a partition, making essentially separate establishments.

On the 18th May, 1929, a fire took place in the part occupied by the plaintiff company, from which smoke penetrated into the

Ladies' Emporium premises, disfiguring the walls and ceiling, and seriously injuring the goods. On the 21st May, Hughes notified the plaintiff in writing of the fire, saying, *inter alia*: "We got the benefit of the smoke . . . the store would be unfit for use until the old paper containing the smell of smoke was taken off and new paper put on, and the store redecorated. Please take notice that until such is done, I will not pay rent . . ." The plaintiff does not seem to have paid any attention to the matter—certainly it did not repair; the tenant did nothing, but remained in legal tenancy of the premises till the end of August, when he left.

On the 19th June, the plaintiff brought an action, which after several transmutations came before the County Court of the County of Middlesex for trial—I do not go into the various steps in the action, as they are of no significance here.

The action is for "\$400, being the amount of rent in arrears for the months of May and June, 1929 . . ." The sum of \$118.50 was paid into court as and for "the rent for the first 18 days of May, 1929," along with \$21 "costs of the action." The statement of defence says:—

"As to the balance of the rent claimed by the plaintiff in this action, the defendants . . . say that the plaintiff is not entitled to recover the same, as under the provisions of the said lease granted by the plaintiff . . . the rent of the said premises ceased until they were repaired and made fit for use and occupancy by the said defendants."

The judgment is for \$400, interest and costs, the sum paid into court to be applied thereon *pro tanto*.

It may be stated at once that all parties have misunderstood the legal position; they have gone on the assumption that the premises were rented on a monthly rent, i.e., that the instalment of \$200 payable on the first day of every month was the rental for that month. No countenance is to be given to that proposition; the rental is \$2,400 *per annum*, there is no rental for the month or for any month, the several monthly payments stipulated for being instalments of the sum of \$2,400 payable as the rental for the year.

The plaintiff does not dispute that it is bound by the agreement in the lease that there shall be an abatement of the rental as therein provided; nor does it deny receiving notice of the fire, or give any reason for not repairing pursuant to the notice, except that the damage to the shop was not caused by fire within the meaning of the lease, and, in any event, the premises were not so injured by fire as to come within the words "untenantable and incapable for use and occupancy by the lessee."

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There can be no doubt that the damage, such as it was, was caused by fire, and we should not interfere with the finding of the learned trial Judge to that effect.

As to the extent of the damage and its effect upon the shop we must bear in mind for what purpose it was used; damage, defacement, which would not in the slightest degree interfere with the use and tenantability of a place to which lumbermen or other mere men resorted to have their boots repaired, might utterly destroy the use and tenantability of an emporium to which ladies resorted for *lingerie*, gloves and "ladies' ware." It is perhaps common knowledge that a somewhat trivial defacement, as it would appear to most men, may have a very serious effect in diminishing the attractiveness of an establishment for the other sex. In any case, it is not common knowledge, or something of which we are to take judicial notice, that such an injury as was here caused by the fire to the Hughes establishment was not such as to make it "untenantable and unfit for use and occupancy by the lessee." That it was such in the opinion of the trial Judge is obvious, and I agree with him.

The authorities on the subject of "tenantability" and "untenantability" are quite uniform—the test laid down in *Proudfoot v. Hart* (1890), 25 Q.B.D. 42, has never been questioned. *Lurcott v. Wakeley*, [1911] 1 K.B. 905, *Calthorpe v. McOscar*, [1923] 2 K.B. 573, *Anstruther-Gough-Calthorpe v. McOscar*, [1924] 1 K.B. 716 (C.A.), may be looked at. At p. 51 of 25 Q.B.D., Esher, M.R., cites with approval the language of Alderson, B., in *Belcher v. McIntosh* (1839), 3 Moo. & R. 186, on the meaning of such words as "tenantable repair," saying that "they must both import such a state as to repair that the premises might be used . . . not only with safety, but with reasonable comfort by the class of persons by whom, and for the sort of purposes for which, they were to be occupied."

The opinion of any mere man without experience in the needs of a business such as was carried on in this shop must be of little use—the wise course is to follow the example of Mr. Justice Wills in a not wholly different case. In *Moxon v. The Marquis Townshend* (1886), 2 Times L.R. 717, the question arose about the obligation to re-paper, re-paint, etc., and the learned Judge, most sensibly, as it seems to me, said: "It might be that under some circumstances it would be necessary under this covenant to re-paint and re-paper . . . and under other circumstances it might not. As he" (the learned Judge) "had . . . to decide this question, he felt himself bound to accept the evidence of the only witness . . . who had inspected the premises with

reference to the agreement between the parties." In other words, the question is, after all, a matter of credible evidence.

The evidence is now to be looked at—the only one who gave evidence as to suitability of the premises after the fire to carry on the business in is the defendant Hughes, who swears specifically that they were not suitable. He was not cross-examined; and we should apply the words in the House of Lords in *Browne v. Dunn* (1893), 6 The Reports 67—If in the course of a case it is intended to suggest that a witness is not speaking the truth upon a particular point, his attention must be directed to the fact by cross-examination shewing that that imputation is intended to be made, so that he may have an opportunity of making any explanation which is open to him, unless it is otherwise quite clear that he had had full notice beforehand that there is an intention to impeach the credibility of his story or the story is of an incredible and romancing character.

Here the witness was not cross-examined; he was the person best acquainted with the needs of his business; and, unless he was deliberately lying, he gave a correct account of the unsuitability of the premises—he could not be mistaken. Moreover, the witness called who spoke on this subject gave an account wholly corroborating his account of the condition of the premises. MacVannell, the manager of a similar business, "wouldn't try to do business there." The only evidence given by the plaintiff is that the cost of repair would be trifling; and, though the matter was an issue, no attempt was made to contradict the defendant Hughes. I venture to think that no Judge would on that evidence have found against the defendant; and the learned trial Judge has not done so. I am unable to see from what the Judge derived the evidence which could justify him in finding that it was reasonably clear that the plaintiff did not think that there was any damage that should have been repaired; but that, if it is the case, has no relevancy—it is not without precedent that one bound to repair thinks that he is not, and sometimes the proverb may be applied: "There is none so blind as those who will not see." The learned Judge says that "the tenant should himself have repaired at the expense of the landlord. . . . See *Amell v. Maloney*, 64 O.L.R. 285 . . . the tenant should have done the work himself, and claimed damages for breach of the landlord's agreement."

These remarks indicate an entire misunderstanding by the Judge of the defendant's position; he is not suing for damages at all; he is defending an action for money payable upon an agreement by relying upon the precise provisions of the agreement itself. He says, "I admit the agreement you sue upon, and say

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that under the terms of that agreement I am not liable." Two more different causes of action can hardly be stated.

Whatever may be the rule in breach of contract resulting in damage, and whatever the duty of the tenant in such a case, these have no relevancy in the present case. It should perhaps be observed that the remarks of my brother Masten in the case in 64 O.L.R. at p. 288, relied upon by the respondent, are a statement of the contention of counsel, not a statement of the law; nor does *Brown v. Trustees of the Toronto General Hospital*, there mentioned, decide that it is the duty but only that it is the right of the tenant himself to repair. It is unnecessary to express an opinion as to the law in such cases, as it has no relevancy in interpreting such an agreement as that here in question.

Whatever the tenant might have done had he thought fit, there was nothing in his want of action, which, in the least, reduced or modified his rights under the agreement; he had the right to say that so long as the premises were left unrepaired his rent should be proportionately reduced; nor had his intention to move if such he had, any influence on his rights.

That he was in default in not paying the instalment of rent of \$200 on the 1st May is clear; and, had the case been tried (say) early in June, he might have been in a difficulty. But under our present practice, while the plaintiff cannot claim beyond what were his right at the *teste* of the writ, the rights of the defendant may be extended by events *post facto*, and up to judgment.

At the time of the trial, the state of disrepair having continued until the expiration of the tenancy, the reduction in rent for that period had come into effect; and the plaintiff was obligated to reduce its rent proportionately, so that it could claim only an amount proportionate to the time of useful occupation; and that admittedly is the amount paid into court. The situation then is that the money paid into court is the whole amount to which the plaintiff is entitled.

In my opinion, the appeal should be allowed with costs; and the judgment, except as stated below, should be limited to the sum so paid in, with costs up to the time of paying in; the plaintiff should pay the subsequent costs of the action, including the trial, costs to be set off *pro tanto*.

I agree, however, with my brother Masten in respect of occupation rent.

The direction for indemnity by Hughes of Buller should stand; there is no objection taken to it; and it is proper on the facts, which I have thought it unnecessary to mention.

MASTEN, J.A.:—In this case the parties have acted unwisely, each with an exaggeratedly selfish view of his own rights. I have no sympathy with either. The covenant in the lease provided that in case of injury to the premises by fire there should be a *proportionate* reduction of rent until the premises are restored by the landlord.

Contrary to the view which I originally entertained, the reasoning in the judgment of my brother Riddell has convinced me that on the evidence appearing in this record we are bound to hold that the infiltration of smoke rendered the premises unfit for use as a shop for the vending of ladies' *lingerie* and like articles.

But the premises, though unfit for that original purpose, were in fact occupied and used by the defendant as a warehouse for the storage of certain merchandise which it was not convenient for him to remove to the new premises, to which, before the fire, he had arranged to move. He did in fact continue to occupy the premises, and I think should be charged under the terms of the lease with a proportionate part of the rent.

If the parties cannot agree on the proportion, there should be a reference to the clerk of the County Court to settle the amount.

LATCHFORD, C.J., ORDE, J.A., and FISHER, J.A., agreed with MASTEN, J.A.

Appeal allowed.

[APPELLATE DIVISION.]

MCMILLAN V. NATIONAL TRUST CO. LTD.

Mortgage—Joint Tenants—Husband and Wife—Death of Husband—Survivorship of Wife—Covenant for Payment—Action upon, by Assignee of Mortgage, against Executors of Wife—Third Party Proceeding—Claim over against Wife for Indemnity—Dismissal—Rights of Joint Tenants inter se—Presumption that Wife Took Property cum Onere not Applicable.

H. C. and V. C., husband and wife, who had been separated for a time, came together under a written agreement, providing, *inter alia*, for the formation of a fund of \$12,000 to be held in trust to pay for the purchase of a house and premises to be a home for the re-united spouses, and to be vested in them as joint tenants. A property was selected, paid for out of the fund, and conveyed to them as joint tenants. A mortgage of the property was made by the two, both executing and covenanting to pay the mortgage-money, \$10,000, and interest. During the lifetime of the husband, the wife paid part of the principal money, \$5,000, while the husband paid the interest. The mortgage became due on the 1st October, 1926, the husband being then alive; he died on the 9th July, 1929; the defendants were his executors. The mortgage became vested in

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the plaintiff in October, 1929, and he, in December, 1929, brought this action against the executors upon the covenant in the mortgage, claiming \$5,000 and interest from the 1st October, 1929. The defendants brought in V. C., the widow, as a third party, and claimed contribution and indemnity from her. She set up an agreement which she testified that she had made with her husband, that each should pay half the principal of the mortgage and the husband should pay the interest:—

Semble, per RIDDELL, J.A., assuming that the third party proceeding was an action by the executors of a deceased person, and the third party an opposite or interested party, that the provisions of sec. 11 of the Evidence Act do not require conclusive evidence of a corroborative character—what is required is the establishment of facts which make it reasonably certain that the story of the party is true—and here the facts were ample corroboration of the third party's story.

But *held*, that, without the assistance of an express agreement, the presumption was that the husband and wife were as between themselves equally liable, neither could call upon the other to pay more than his proper share, and, one of them dying, his executors were in no better case.

The executors had, therefore, no right to call upon the third party, and the claim over against her should be dismissed.

The rights, *inter se*, of the mortgagors accrued at least as early as the maturity of the mortgage, before the death of the husband; and nothing had happened since to divest the wife of any right.

The doctrine that on the sale of an encumbered property there is an implied liability of the purchaser to indemnify the vendor against the encumbrance, the purchaser being presumed to take the property *cum onere*, had no application, for the wife took nothing from the husband, her title coming only from the grant made to them as joint tenants.

Per LATCHFORD, C.J., and MASTER, J.A.:—While the husband and wife were each liable to the mortgagee for the whole principal, as between themselves they were, apart from any express agreement, each liable for one-half. The circumstance that the wife as joint tenant with her husband became sole owner in fee on his death did not relieve his estate of the obligation to her which had accrued before his death.

Per ORDE, J.A.:—The third party's title as a joint tenant was not derived from her husband. It preceded the execution of the mortgage, and was not subject at the time of its acquisition to any burden which might ultimately fall wholly upon her by implication as a necessary incident. In the absence of some agreement to the contrary, there was nothing in the transaction to alter the implied obligation of each to indemnify the other in respect of any payment in excess of his or her share of the debt.

Re Gracey (1928), 63 O.L.R. 218, distinguished.

ACTION against the executors of the will of Herbert Carter, deceased, to recover \$5,000 as the balance remaining unpaid upon a mortgage made by the deceased and his wife Vida E. Carter, and assigned to the plaintiff. The defendants brought in Vida E. Carter as a third party.

The action and third party issue were tried before KELLY, J., without a jury, at a Toronto sittings.

J. M. Godfrey, K.C., and *J. E. Corcoran*, for the plaintiff and the third party.

G. T. Walsh, K.C., and *C. M. Sinclair*, for the defendants.

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July 8, 1930. KELLY, J.:—The plaintiff, who is the assignee of the mortgage herein mentioned, sues to recover from the estate of Herbert Carter, deceased, \$5,000 and interest, as the balance remaining unpaid thereon. All the parties seem to agree that the unpaid principal is \$5,000. The mortgage bears date the 23rd August, 1921, and was made by Carter and his wife, Vida E. Carter, the third party in these proceedings, to one Floy L. Palmer, to secure \$10,000 and interest; and, though both mortgagors covenanted to pay the mortgage-money and interest, the plaintiff does not claim herein against Vida E. Carter. Herbert Carter died on the 9th July, 1929. The mortgage at that time was held by one Hayhurst, to whom Floy L. Palmer had assigned it. On the 21st October, 1929, Hayhurst assigned the mortgage to the plaintiff, who is Vida E. Carter's brother. Though from the evidence and the plaintiff's attitude at the trial his purpose in taking the assignment may readily be inferred, he is nevertheless entitled, as between him, as the holder of the mortgage, and the estate, to recover against it, with costs.

In the third party proceedings the defendants claim over against Vida E. Carter. The statement of claim omits to state important facts which are necessary to a proper understanding of the situation, namely, that Vida E. Carter, as well as Herbert Carter, is a mortgagor; that she, as well as he, covenanted for payment; that, when the mortgage was made, they held the mortgaged property as joint tenants; and that at the time of Carter's death it was still so held in joint tenancy, subject to that mortgage. In that condition of the title and the interests of the joint tenants—unless varied or qualified by some binding agreement or arrangement—the property on Carter's death devolved by survivorship upon Vida E. Carter (his interest on his death being extinguished), subject to the mortgage then thereon, in the manner declared in *Re Gracey* (1928), 63 O.L.R. 218, at p. 219. In her defence to the claim now made against her by the executors of her husband she sets up an agreement that her husband was to pay one-half of the total principal of the mortgage; that she has paid one-half thereof; and therefore her husband's estate is now liable for payment of the other \$5,000 without any right of contribution from her. On the 7th June, 1921, she and Herbert Carter entered into an agreement (amongst other things) looking to the purchase of a home for them, and that home was in August of that year purchased and conveyed to them as joint tenants, part

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of the purchase-price thereof being secured by this mortgage. In that agreement it was agreed that, as long as the parties should occupy the property as a home and live amicably together, Carter was to pay the necessary carrying expenses thereof, such as taxes, insurance premiums, and repairs. They did continue to live together until the time of his death, he having in the meantime paid the interest upon the mortgage—and, I assume, the other carrying charges as well. In that time she made several payments on the principal of the mortgage. In her statement of defence in the third party proceedings she has alleged that her husband induced her to agree to pay one-half of the principal of the mortgage, he promising to pay the other half. In her evidence she says that that happened before the making of the mortgage, to the amount of which she says she then objected, her solicitor, Mr. Lawson, who is one of the trustees of the agreement of the 7th June, 1921, being present. There is no evidence of any written record of that agreement. Mr. Lawson in his evidence at the trial would not swear to any specific promise being made; the farthest he would go being an expression of confidence that there must have been an arrangement for the husband paying. That, however, is not evidence on which to found a conclusion; and, moreover, I feel assured that, if any such agreement or arrangement had been made or seriously intended, he as her solicitor would have seen to it that it was reduced into written and binding form. The husband and wife had then only recently, by the agreement of the 7th June, settled grave differences between them in which they were undoubtedly at arms' length, and I cannot conceive, in that condition of things, that if they had made or intended to make the important agreement or arrangement she now sets up, and which involved many thousands of dollars, she would have been satisfied to rely upon a mere verbal promise or a casual statement or remark of her husband, even if her statement were accepted that he did make it. Moreover, what she says lacks necessary corroboration. Mr. Lawson's inability to swear to any specific promise excludes his evidence as corroborative.

I find, therefore, that there was no agreement or arrangement which would take the case out of the authority of *Re Gracey*; and, as between the defendants and the third party, the question must therefore be dealt with merely as if the property on the husband's death devolved upon the third party by survivorship, subject to the mortgage.

The defendants are entitled to recover against the third party such sum or sums as they shall pay the plaintiff on his claim, and on payment in full to an assignment of the mortgage.

As against the third party the defendants will have their costs of the third party proceedings and be entitled also to recover the amount of their costs in the plaintiff's action from the commencement of the third party proceedings.

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The third party appealed from the judgment of KELLY, J.

November 10, 1930. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, and ORDE, J.J.A.

Godfrey, K.C., and *Corcoran*, for the appellant, argued that the death of a joint tenant does not cast the whole burden of the indebtedness upon the surviving tenant. The liabilities of the parties depended upon the joint contract and the relationship at the time the liability was incurred, and here there was no implied agreement by either party to indemnify the other as against one-half of the liability. The appellant having discharged one-half of the liability, it was incumbent upon the defendants to discharge the other half. Where two persons are jointly liable on a covenant, the presumption is that they are as between themselves equally liable, and as between themselves neither can call upon the other to pay more than his equal share. If one of them dies, his executors are in no better position: *Halsbury's Laws of England*, vol. 7, p. 471, para. 958; *Prior v. Hembrow* (1841), 8 M. & W. 873. There was sufficient corroboration of the alleged agreement between the parties that, if the third party would pay one-half of the mortgage-money in question, the deceased Herbert Carter would discharge the other half.

Walsh, K.C., and *Sinclair*, for the defendants, respondents, contended that the wife, having survived her husband, took all the property, but subject to all the encumbrances. Having obtained all the property it would be inequitable to keep it all. In any event, if the defendants paid their half, they were entitled to an assignment of the mortgage: *Re Gracey*, 63 O.L.R. 218; *Waring v. Ward* (1802), 7 Ves. 332; *Beatty v. Fitzsimmons* (1893), 23 O.R. 245.

January 23, 1931. RIDDELL, J.A.:—This is an appeal by the third party, Mrs. Carter, from the judgment of Mr. Justice Kelly at the trial at Toronto. The facts are a little unusual. Mr. and Mrs. Carter, having differences, parted for a time; but came together under a written agreement. This, *inter alia*, provided for the formation of a trust fund of \$12,000 to be held in trust for the following purposes:—

“(a) To pay for the purchase of a house and premises to be a home for the parties hereto, to be chosen by the parties hereto within one year from the date hereof, and, at the direction of the

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parties hereto, any portion of the said trust fund to be applied for the purpose.

“(b) Any premises so purchased as aforesaid to be vested in the parties hereto as joint tenants and not as tenants in common.

“(c) To hold the balance of such fund remaining after purchase of the said home or premises as aforesaid in trust, or . . .”

(The other terms are not material.)

A house was shortly thereafter bought for a residence for the couple, who intended and agreed to live amicably together, and the trust fund was applied as had been agreed. The property was conveyed to them “as joint tenants and not as tenants in common.” The mortgage which is in question in this action was made by the two, husband and wife, both executing and covenanting to pay the mortgage-money of \$10,000 and interest. During the lifetime of the husband, the wife admittedly paid part of the principal money, the sum of \$5,000, while the husband paid the interest. The mortgage became due on the 1st October, 1926, the husband living; he died on the 9th July, 1929, and the trust company are his executors. The mortgage by mesne conveyances became vested in the plaintiff in October, 1929, and he, in December, 1929, brought this action against the trust company as such executors on the covenant in the mortgage, claiming \$5,000 and interest from the 1st October, 1929. The trust company served a third party notice on Mrs. Carter, claiming “contribution and indemnity from” her “to the full extent of any sum the plaintiff may recover.”

The action was tried before Mr. Justice Kelly at Toronto, when the learned Judge gave judgment against the trust company for the amount claimed with costs, and directed that, upon the payment of these, the mortgage should be assigned to the company, and that the third party should pay to the defendant company the amount they paid and also pay the defendant company's costs of the third party proceedings. The third party now appeals.

The third party set up an agreement which she said she had made with her husband that each should pay half the principal of the mortgage and the husband should pay the interest. The learned trial Judge found that there was no corroboration of this evidence and declined to give effect to it. My present impression is that he was in error; the stringent provisions of the Evidence Act, R.S.O. 1927, ch. 107, sec. 11, do not go so far as to require conclusive evidence of a corroborative character; the cases cited in 4 C.E.D. (Ont.), pp. 716 *et seq.*, shew that what is required is the establishment of facts which make it reasonably certain that the story of the party is true. Assuming that the present is “an action by . . . executors . . . of a deceased person,” and that the

third party is "an opposite or interested party," I, as at present advised, am of the opinion that there is ample corroboration in the admitted facts of the case. The husband himself took his wife's money to the mortgagee, and paid it on the principal; at the same time he took his money and paid with it the interest and insisted on obtaining separate receipts; when the wife had thus paid half the principal, though he lived nearly three years after the mortgage was due, and long after his wife's last payment, he does not seem to have made any move to have her pay more, but he continued to pay interest. It seems to me that these facts are ample corroboration of the third party's story.

But I do not think we need call in the assistance of an express agreement; it will be enough to apply elementary principles of law to shew that the claim against the wife is not well founded.

Where two persons are, as in this case, jointly liable upon a covenant, the presumption is that they are as between themselves equally liable, and as between themselves neither can call upon the other to pay more than his proper share; if one of them dies, his executors are in no better case: *Prior v. Hembrow*, 8 M. & W. 873. The whole principle is sufficiently discussed in Halsbury's Laws of England, vol. 7, pp. 470 *et seq.*; and it is too well known to require any affirmation by us.

The result is that the trust company has no right to call upon the third party, and the "action," if it is an "action," against her, should have been dismissed. The appeal should be allowed and the third party proceedings dismissed with costs here and below.

It may, perhaps, be noted that the rights, *inter se*, of the mortgagors accrued at least as early as the maturity of the mortgage, before the death of the husband; and nothing has happened since to divest the wife of any right.

Moreover, the wife had the same right as the trust company to an assignment of the mortgage, on paying it off; consequently she by paying the amount due would be entitled to compel the trust company to reimburse her—which would result in the same state of affairs as the dismissal of their claim against her. Or, even without paying, she might bring an action against the trust company to compel the payment by the executor of the incumbrance upon her property which they should remove.

On the argument of the appeal, we were pressed with the *cum onere* doctrine of such cases as *Waring v. Ward*, 7 Ves. 332; *Mills v. United Counties Bank Ltd.*, [1911] 1 Ch. 669, [1912] 1 Ch. 231; *Beatty v. Fitzsimmons*, 23 O.R. 245; but that doctrine has no application here. The doctrine is substantially that on the sale of an encumbered property there is, in the absence of an express

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agreement, an implied liability of the purchaser to indemnify the vendor against the encumbrance, the purchaser being presumed to take the property with the burden—*cum onere*. Here the wife took nothing from the husband, her title coming from the grant made to them as joint tenants, and not, in any sense, from him. All that he did was to disappear and allow her to have her own property.

MASTEN, J.A.:—Appeal from the judgment of Kelly, J., dated the 4th June, 1930, awarding to the defendants relief over against the third party for any sum which they were obliged to pay to the plaintiff in respect of a joint and several covenant contained in a mortgage executed by the defendant company's testator and the third party.

I would allow this appeal and dismiss with costs the claim of the defendant against the third party. My brother Kelly appears to have been bound by his own decision in *Re Gracey*, 63 O.L.R. 218, to give to the defendants the relief over against the third party which has been accorded. On the argument before us I was disposed to dismiss the appeal, but further consideration has changed my view. I would dispose of the appeal on the simple ground that, while Mr. and Mrs. Carter were each individually liable to the mortgagee for the whole principal (\$10,000) of the mortgage, yet as between themselves they were, apart from any express agreement, each liable for one-half of the principal. The mortgage fell due during the lifetime of Mr. Carter, and thereupon the rights and obligations of Mr. and Mrs. Carter as between themselves crystallised, and Mr. Carter, as against Mrs. Carter, became liable to pay off the mortgage to the extent of \$5,000. On Carter's death that obligation devolved on his executors, and consequently they have no right to relief over against Mrs. Carter.

The circumstance that Mrs. Carter as joint tenant with her husband became sole owner in fee on the death of her husband does not relieve his estate of the obligation toward her which had accrued before his death.

Mr. Walsh, for the defendant, very ingeniously endeavoured to present the situation as if the premises had been purchased by Mr. and Mrs. Carter subject to a mortgage previously existing given by a prior owner. I express no opinion as to what might have been the outcome of such a situation, for such a situation differs in important respects from the present case, where the husband and wife gave the mortgage sued on and entered into a joint and several covenant to pay the principal thereby secured.

LATCHFORD, C.J., agreed with MASTEN, J.A.

ORDE, J.A. :—That joint and several covenantors are bound, as among themselves, and in the absence of some agreement to the contrary, to pay only their respective shares of the debt, and that each is entitled to contribution from the others for anything paid in excess of his share, is clearly established.

Does the fact that the indebtedness is secured by a mortgage upon land which is held by the two covenantors as joint tenants affect the matter? It is argued that it does, and that, because one of the joint and several covenantors has died, and the land has become wholly vested in the survivor, the estate of the deceased covenantor is, as against the survivor, absolved from liability.

No authority was cited in support of that contention, but it was sought to draw some analogy between this case and that of a devisee of land which is subject to a mortgage, where the devisee must take the subject of the devise *cum onere*. *Re Gracey*, 63 O.L.R. 218, was cited in support of that argument. But there is no parallel between that case and this. Though the land there was held in joint tenancy, the mortgage had presumably been given by some predecessor in title of the two joint tenants. The report is not clear as to that. But in any case there was no ruling there upon the point now raised.

The fact that the joint and several obligation is secured by a mortgage has, in my judgment, no bearing upon the right to contribution. Had the money been borrowed from a bank upon the Carters' joint and several promissory note, could the fact that it had been used in the purchase of the land have affected the right to contribution merely because each party consented that the land should be acquired by them as joint tenants? Had Carter paid his half of the mortgage-debt during his lifetime could his estate now recover the sum so paid from the other joint covenantor merely because the land had become wholly vested in her by his death? I know of no principle which would justify any such recovery. The situation would be exactly the same as if the original purchase had been for cash. Whatever each contributed to the joint purchase must be subject to the risk of being wholly lost to the estate of the one who dies first. That is a necessary incident of joint tenancy unless it is severed in the lifetime of both.

Mrs. Carter's title is not derived from her husband. Her title as a joint tenant preceded the execution of the mortgage. Her title as a joint tenant was not subject at the time of its acquisition to any burden which might ultimately fall wholly upon her by implication or as a necessary incident. There is no foundation whatever for the application of the principle that she acquired the property *cum onere*. If the joint tenants saw fit to secure a joint

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and several debt by mortgaging the lands, there is nothing in the transaction that I can discover, in the absence of some agreement to the contrary, to alter the implied obligation of each to indemnify the other in respect of any payment in excess of his or her share of the debt.

I agree that the appeal should be allowed.

Appeal allowed.

[APPELLATE DIVISION.]

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Negligence—Motor-vehicle upon Highway—Injury to Pedestrian Crossing City Street at Intersection—Negligence of Driver of Vehicle—Finding of Trial Judge—Duty of Pedestrian—Whether Guilty of Contributory Negligence—Right to Assume that Care would be Exercised by Approaching Motorists—Causa Causans of Injury.

The plaintiff, a woman of 65 years, about 6.30 p.m. on the 2nd January, 1930, was crossing C-street, in the city of T., from south to north, at the intersection of A-street, on foot. Before proceeding to cross, she had looked in all directions, and, observing that everything was clear, walked as far as the devil-strip between two street railway lines laid on C-street, where she was struck and injured by a motor-truck owned by one of the defendants and driven in a westerly direction by the other defendant. An independent eye-witness, who was standing at the south-easterly corner of the two streets, testified at the trial of an action to recover damages for the plaintiff's injuries, that he saw her start to cross the street in a straight line to the north, and that at that time the truck was about at the next street east of A-street; and that when she got to the devil-strip the truck was 25 yards east of where she was at that time; that the truck was travelling at a rate of not less than 20 miles an hour; and that there was nothing to prevent the driver seeing the plaintiff at a distance of 25 yards. The driver swore that he was travelling at about 18 miles an hour, and when he first saw the plaintiff she was "right in front" of him, not more than 6 feet distant; that he did not sound his gong; and that his not seeing her earlier was "due to bad weather conditions." The trial Judge found that the night was clear at the time and that there was sufficient light to have shewn her up clearly; and he found the driver guilty of negligence and the plaintiff not guilty of contributory negligence:—

Held, by the majority of the Court, that, the onus being on the defendants to prove that they were not negligent and that the plaintiff was guilty of contributory negligence, they had failed to satisfy it. Once a pedestrian has legitimately, i.e. without negligence, got into vehicular traffic and has begun to cross, he or she must be allowed to continue and complete the crossing in safety—it is only when a pedestrian observes approaching traffic at the time when he ventures to cross that he is bound to exercise care by keeping that traffic in sight—the plaintiff had the right to assume that any one who might come up to the crossing she had already entered would exercise care by reducing his speed or stopping.

Rex v. Broad, [1915] A.C. 1110, *Myers v. Toronto Railway Co.* (1913), 30 O.L.R. 263, and *Jones v. Toronto and York Radial Railway Co.* (1911), 25 O.L.R. 158, followed.

The actual *causa causans* of the accident was the negligence of the truck-driver.

Per MASTEN, J.A. (dissenting):—When the plaintiff reached the devil-strip it was her duty to look again. There was no evidence whether she did so or not; if she did not look she was negligent; if she did look she must have seen the truck and was negligent in stepping in front of it. The case was governed by *Admiralty Commissioners v. S.S. Volute*, [1922] 1 A.C. 129.

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AN appeal by the defendants from the judgment of LOGIE, J., before whom, without a jury, the action was tried, in favour of the plaintiffs for the recovery of \$3,500 damages in consequence of injuries sustained by the plaintiff Pearl Alter when run into by a motor-truck operated upon a highway by the defendant Lewis Soloway and owned by the defendant Abraham Soloway. The trial Judge found negligence on the part of Lewis Soloway and no contributory negligence on the part of Pearl Alter.

November 21, 1930. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, and FISHER, J.J.A.

D. L. McCarthy, K.C., and *L. Kert*, for the appellants, argued that the plaintiff Pearl Alter was guilty of contributory negligence in not looking east when she had reached the centre of the road. Her looking both east and west before she left the sidewalk was not enough: *Admiralty Commissioners v. S.S. Volute*, [1922] 1 A.C. 129; *Jones v. Toronto and York Radial Railway Co.* (1911), 25 O.L.R. 158. The two acts of negligence, that of the defendant and that of the plaintiff, were concurrent, and so there could be no ultimate negligence: *Morris v. Hamilton Radial Electric Railway Co.* (1922), 52 O.L.R. 120; *Field v. Sarnia Street Railway Co.* (1921), 50 O.L.R. 260; *Parsons v. Toronto Railway Co.* (1919), 45 O.L.R. 627; *London Street Railway Co. v. Brown* (1901), 31 Can. S.C.R. 642; *Toronto Railway Co. v. Mulvaney* (1907), 38 Can. S.C.R. 327; *Allen v. North Metropolitan Tramways Co.* (1888), 4 Times L.R. 561.

J. R. Cartwright, for the plaintiffs, respondents, contended that the onus of proving contributory negligence was on the defendants, and this onus had not been satisfied. Even if the woman plaintiff was guilty of contributory negligence, that was not the proximate cause of the accident—the ultimate negligence of the defendants was: *Rex v. Broad*, [1915] A.C. 1110; *Farber v. Toronto Transportation Commission* (1925), 56 O.L.R. 537; *Forwood v. City of Toronto* (1892), 22 O.R. 351.

January 23, 1931. FISHER, J.A.:—Appeal by the defendants

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the defendant Abraham Soloway and driven by his son, the de-
fendant Lewis Soloway, upon the streets of the city of Toronto.
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Fisher, J.A. the part of the plaintiff Pearl Alter, found that the real cause of
the accident was the defendant Lewis Soloway's negligence, and
awarded the plaintiffs the sum of \$3,500 as damages.

Counsel for the appellants did not seriously contend before this Court that the defendant Lewis Soloway was not guilty of negligence, nor did he find fault with the amount of damages awarded, but strenuously argued that the plaintiff Pearl Alter was guilty of contributory negligence.

Counsel for the respondents contended that there was no contributory negligence, and if there was that the defendant Lewis Soloway was guilty of ultimate negligence.

To determine the points involved, it is necessary to set out the facts. The plaintiff Pearl Alter, a woman 65 years of age, at about 6.30 p.m. on the 2nd January, 1930, was crossing College-street from the south to the north at the intersection of Augusta-street; before proceeding to cross, she looked in all directions, and, observing that everything was clear, proceeded to cross over, and when she reached the devil-strip between the two railway lines she was struck by a truck owned by the defendant Abraham Soloway and driven in a westerly direction by the other defendant, partly on the devil-strip and between the northerly street railway lines. The plaintiff Pearl Alter has no recollection (no doubt due to concussion) of what happened after she started to cross the street.

The only independent eye-witness of the accident was a man of the name of Engleman, who was standing at the south-easterly corner of College-street and Augusta-street. He swore that he saw Mrs. Alter start to cross the street in a straight line to the north, and that at that time the truck was about at Spadina-avenue, to the east. When Mrs. Alter got about to the devil-strip, he observed that the truck was about 25 yards east of where she was at that time; that the truck was proceeding at not less than 20 miles an hour, and that there was no difficulty in the truck-driver seeing Mrs. Alter at a distance of 25 yards.

Lewis Soloway swore that he was travelling at about 18 miles an hour, and when he first saw Mrs. Alter she was right in front of him, and not distant more than 6 feet; that he did not sound his gong; and his not seeing her before was due to bad weather conditions. On these facts was the trial Judge right in the conclusions he arrived at?

The learned Judge in his reasons for judgment stated, "I accept the statement of the plaintiff and that of Engleman." Was it contributory negligence on her part not to have kept her eye constantly directed to either left or right in order to get across the street in safety? "Finding the facts, as I do, that the night was clear at that time, that there was sufficient light to have shewn her up clearly on the street . . . and witnesses whose evidence I accept in this respect stated that they could see as far as Spadina at that time, I cannot see that she was guilty of contributory negligence." "If there was negligence, it was so slight as not to be contributory."

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The onus in this case is on the defendants to prove that they were not negligent, and also to prove that the plaintiff Pearl Alter was guilty of contributory negligence. The defendants offered no evidence that she did not look after she was on the devil-strip, and I can see no reason for the Court inferring that she did not look. This is not a case where a pedestrian is found crossing a street at a place other than an intersection, but of a pedestrian exercising care by looking before proceeding to cross; and, having done that, my opinion is that once a pedestrian has got into vehicular traffic and has begun to cross, he must be allowed to continue his crossing in safety and to finish it. That is the law as laid down by Lord Sumner in *Rex v. Broad*, [1915] A.C. 1110, 1115. The plaintiff having looked before she started across, and everything then being clear, she had the right to assume that any one who might come up to the crossing she had already entered would exercise care by reducing his speed or stopping. See *Myers v. Toronto Railway Co.* (1913), 30 O.L.R. 263. It is only when a pedestrian observes approaching traffic at the time when he ventures to cross that he is bound to exercise care by keeping that traffic in sight: *Jones v. Toronto and York Radial Railway Co.*, 25 O.L.R. 158.

The evidence in this case is conclusive that the driver of the truck could have seen the plaintiff Pearl Alter at a distance of 75 feet, and his frank admission is that he did not see her until he was within 6 feet. What possible excuse can there be for the conduct of any driver keeping up a speed of even 18 miles per hour over intersections if he had not a clear view owing to weather conditions? But on the evidence the learned Judge has found that the driver of the truck had a clear view of 75 feet, and the driver has offered no excuse for not seeing the plaintiff Pearl Alter at that distance. Had the defendant been looking, as he was bound to—especially at an intersection—he could have stopped, slackened his speed, or, there being no approaching traffic, could have turned his truck to the left and avoided the accident. All of which, without the slightest excuse or justification, he seems to have ignored, and

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to my mind such conduct amounted to a gross act of negligence and was the *causa causans* of the accident.

We heard very considerable argument on the question of ultimate negligence, but it must always be borne in mind that discussions on what is called ultimate negligence, the last chance, etc., are really discussions upon the actual *causa causans*, and in the present case I have no hesitation in holding, as I have said, that the actual *causa causans* of this accident was the negligence of the defendant Lewis Soloway.

Many cases were cited to us throughout the argument having reference to contributory negligence and ultimate negligence, but, where the evidence is so clear as I find it in this case, they are of little assistance, and I deem it unnecessary to refer to or discuss them.

The conclusion I have come to is that the judgment of the trial Judge was right and should not be disturbed. I would dismiss the appeal with costs.

LATCHFORD, C.J., agreed with FISHER, J.A.

RIDDELL, J.A.:—While I do not think that it is proved that the plaintiff Pearl Alter was guilty of negligence, I think, if she was guilty of negligence at all, it was, at the most, a condition *causa sine qua non*, not *causa causans*, of the accident; and that the negligence of the defendant was the sole *causa causans*; consequently, I agree with the conclusion of my brother Fisher, that the appeal should be dismissed with costs.

MASTEN, J.A.:—In this case I have the misfortune to differ from the other members of this Court. In regard to the users of highways, my sympathies are all with the down-trodden pedestrian class as against the truck-driver. Nevertheless, I am unwilling to concur in what might hereafter be claimed to be a declaration of established law of Ontario, viz., that a pedestrian about to cross a busy thoroughfare can take one look before starting to cross the street, and, if he sees nothing to interfere, can then cross with his eyes shut, and if he is injured put the blame wholly on the other man and none on himself. I think we are all agreed on the law, that negligence is the failure to exercise reasonable care in the given circumstances.

The real difference between myself and other members of the Court is in the view taken of the facts of this case. To me Mr. McCarthy's argument seems unanswerable. This plaintiff walked slowly and took some time to cross College-street from south to north. Before starting to cross she looked, but her attention would

naturally be centred principally on the traffic coming east on the south side of College-street. When she was about reaching the devil-strip or centre of College-street, the scene shifted and the traffic to be avoided was the traffic going west on the north side of College-street. Then at that point I think it was her duty to look again. There is no evidence whether she did so or not, but that does not help her. If she did not look she was negligent. If she did look she must have seen the truck and was negligent in stepping in front of it.

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It seems to me that this appeal is governed by the decision of the House of Lords in the *Volute* case, [1922] 1 A.C. 129. That was a collision at sea between two vessels, and, reversing the Court of Appeal, the House of Lords held (p. 145): "The *Volute*, in the ordinary plain common-sense of this business, having contributed to the accident, it would be right for your Lordships to hold both vessels to blame for the collision."

In reaching that conclusion Birkenhead, Lord Chancellor, at p. 144, after an extended review of the cases, says:—

"Upon the whole I think that the question of contributory negligence must be dealt with somewhat broadly and upon common-sense principles as a jury would probably deal with it. And while no doubt, where a clear line can be drawn, the subsequent negligence is the only one to look to, there are cases in which the two acts come so closely together, and the second act of negligence is so much mixed up with the state of things brought about by the first act, that the party secondly negligent, while not held free from blame under the *Bywell Castle** rule, might, on the other hand, invoke the prior negligence as being part of the cause of the collision so as to make it a case of contribution."

In the appeal now under consideration the two acts of negligence, that of the defendant and that of the plaintiff, seem to me to be synchronous or concurrent and the doctrine of ultimate negligence has no application. The discussion in the *Volute* case appears to me so relevant to the facts of this case that I venture to quote further from the judgment of Birkenhead, Lord Chancellor, beginning at p. 136:—

"In all cases of damage by collision on land or sea, there are three ways in which the question of contributory negligence may arise. A. is suing for damage thereby received. He was negligent, but his negligence had brought about a state of things in which there would have been no damage if B. had not been subsequently and severably negligent. A. recovers in full: see among other cases *Spaight v. Tedcastle* (1881), 6 App. Cas. 217; and *The Margaret* (1884), 9 App. Cas. 873."

* *The Bywell Castle* (1879), 4 P.D. 219.

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"At the other end of the chain, A.'s negligence makes collision so threatening that though by the appropriate measure B. could avoid it, B. has not really time to think and by mistake takes the wrong measure. B. is not held to be guilty of any negligence and A. wholly fails: *The Bywell Castle*, 4 P.D. 219; *Stoomvaart Maatschappij Nederland v. Peninsular and Oriental Steam Navigation Co.* (1880), 5 App. Cas. 876.

"In between these two termini come the cases where the negligence is deemed contributory, and the plaintiff in common law recovers nothing, while in Admiralty damages are divided in some proportion or other.

"Lord Blackburn, in *The Margaret*, 9 App. Cas. 873, was of opinion that the area of this middle space was the same for Admiralty as for common law, and his opinion may be accepted subject to a possible qualification arising out of the subsequent passing of the Maritime Conventions Act, 1911.

"How, then, are its limits to be ascertained? Contributory negligence certainly arises when the negligence is contemporaneous, but are the only cases of contributory negligence cases where the negligence is contemporaneous? Is it to be the rule that in all cases if the tribunal can find a period at which A.'s negligence has ceased and after which B.'s negligence has begun that then the negligence of A. is to be disregarded? If such should be the rule it will be found that the cases of contributory negligence would be few.

"If two roads intersect each other at right angles and there is a large building at the point of intersection, and two people are running or riding or driving at a reckless pace, one down each street, and meet at the corner, it would be easy to say that both were in fault and equally so. If the courses of two motor-cars cross and there is no rule of the road such as that at sea requiring one to give way and the other to keep her course, and both hold on, both are equally to blame."

The judgment of Lord Birkenhead was concurred in by all the other Lords, and Lord Finlay took occasion to say that he regarded the judgment "as a great and permanent contribution to our law on the subject of contributory negligence."

The outstanding points determined by this case seem to me to be:—

(1) Ultimate negligence is confined definitely to cases where, though the plaintiff is negligent, there would have been no damage if the defendant, after he became aware or ought to have become aware of the plaintiff's negligence, had not been *subsequently and severably negligent*.

(2) That contributory negligence on the part of the plaintiff exists where, before the passing of our present Act, contributory negligence would have been found at common law. Applying that rule to the present appeal, could this plaintiff by the use of due diligence have avoided the accident? (See *Spaight v. Tedcastle*, 6 App. Cas. at p. 221, per Lord Blackburn). If she could, then she is guilty of contributory negligence unless the defendant's negligence has created a situation so threatening that the plaintiff has not time to think and act wisely.

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(3) The question of contributory negligence is to be dealt with somewhat broadly and on common-sense principles, as a jury would probably deal with it. Ultra-metaphysical distinctions and refinements, whether they relate to ultimate negligence or to proximate negligence, are to be applied with great caution.

Applying these considerations to the facts of this appeal, I observe in the first place that there was no ultimate negligence. The driver of the truck was not subsequently and severably negligent. He did not look at all till he was 6 feet away. But, if he had seen the plaintiff Pearl Alter when he was 75 feet away, there was nothing to indicate that she was going to step in front of his truck. He had every right to suppose that she would stand still and let him pass. Secondly, it needs no discussion to establish that if the plaintiff had exercised reasonable care, having regard to the width of the street, the volume of the traffic, the darkness of the night, and the slowness of her own gait, the accident would not have happened, and, using the phrase of Lord Birkenhead, "in the ordinary plain common-sense of this business, having contributed to the accident," I would assess her blame as one-third of the whole and the defendants' as two-thirds.

That the defendant Lewis Soloway was guilty of negligence there can be no doubt, but it does not contribute to the determination of the issue as to the plaintiff Pearl Alter's contributory negligence to emphasise the defendant's fault. The circumstance that A. is very bad does not prove that B. is good.

I would allow the appeal to the extent and in the manner above indicated.

Appeal dismissed (MASTEN, J.A., dissenting).

[APPELLATE DIVISION.]

1931.

TOPPING V. OSHAWA STREET RAILWAY CO.

Jan. 23.

Negligence—Injury to Passengers in Street-car—Collision of Street-car with Motor-truck upon Highway—Cause of Collision—Negligence of both Motorman and Truck-driver—Negligence Act, 1930, 20 Geo. V. ch. 27, secs. 3, 5—Contribution between Joint Tort-feasors—Degrees of Fault—Appeal and Cross-appeal—Costs.

The two plaintiffs were passengers in a car of the defendant railway company, proceeding south; coming north was a motor-truck of the defendant transport company; when at some distance south of the street-car, but in plain sight of it, the driver of the truck, seeing an automobile parked at the east kerb, turned in to the west upon the railway track; missing the automobile some 30 feet, he turned east to get off the track and avoid the street-car; by reason of the slippery condition of the place, his driving wheels slipped and his truck swung around, but did not leave a clear course for the street-car to pass. The motorman saw the truck, but apparently appreciated the danger too late: he did not apply his brakes soon enough to avoid striking the stalled truck; an impact took place, and the plaintiffs were injured. Upon the trial (without a jury) of an action to recover damages for their injuries, the Judge found that the driver of the truck was negligent, but considered that the effective cause of the accident was the negligence of the motorman of the street-car, and pronounced judgment against the street railway company, dismissing the action against the other defendant:—

Held, upon appeals by the railway company and the plaintiffs, that the case came under sec. 3 of the Negligence Act, 1930, which became operative a few days before the accident; and the railway company was right in asserting that, even if it should be held liable for the total damages of the plaintiffs, its co-defendant was liable to make contribution to an extent to be determined by their relative negligence.

And *held*, following *British Columbia Electric Railway Co. v. Loach*. [1916] 1 A.C. 719, that the conduct of the truck-driver was in some degree the cause of the accident—*causa causans*, not merely *causa sine qua non*—he took it upon himself to go where he should not have gone without being sure that he could get out of the way of the approaching street-car, he incapacitated himself from using such care as would have enabled him to avoid any negligence on the part of the motorman; and his employer, as well as the railway company, must be held responsible.

Held, also, that it was not practicable to determine the respective degree of fault or negligence as between the parties (sec. 5), and each must be found equally at fault.

The appeal of the plaintiffs was therefore allowed and that of the defendant railway company dismissed, with a special order as to costs.

AN appeal by the defendant the Oshawa Street Railway Company and cross-appeal by the plaintiffs from the judgment of RANEY, J., at the trial, without a jury, of an action for damages for injuries sustained by the plaintiffs, who were passengers in one of the defendant railway company's street-cars when a collision occurred between that car and a motor-truck of the defendant the

Smith Transport Company. The plaintiffs alleged negligence of both defendants. The trial Judge directed judgment to be entered for the plaintiffs for \$1,200 and \$300, respectively, against the street railway company, with costs, and dismissed the action against the other defendant without costs.

The reasons for judgment of RANNEY, J. (1930), are noted in 39 O.W.N. 123.

December 2 and 3, 1930. The appeals were heard by LATCHFORD, C.J., RIDDELL, MASTEN, and FISHER, J.J.A.

D. L. McCarthy, K.C., for the defendant railway company, argued that its motorman was not negligent in the circumstances of the case, but the negligence of the driver of the Smith Transport Company's truck was the proximate cause of the accident. The motorman had the right of way on the railway company's tracks, and his right was interfered with by the truck-driver. The onus of proving his innocence was on the truck-driver: *Admiralty Commissioners v. S.S. Volute*, [1922] 1 A.C. 129; *Swadling v. Cooper*, [1931] A.C. 1; *Ballantine v. International Railway Co.* (1927), 61 O.L.R. 273, especially at p. 292; *Riverdale Garage Ltd. v. Barrett Brothers* (1930), 65 O.L.R. 616. Even if the railway company should be held liable *in toto*, its co-defendant should be compelled to contribute in a degree to be determined by their respective negligences, under the Negligence Act, 1930: *Carter v. Van Camp*, [1930] S.C.R. 156.

I. Levinter, for the defendant the Smith Transport Company, said there was a finding of fact in its favour by the trial Judge, which should not be disturbed. Any negligence of the truck-driver was merely *causa sine quâ non*, not *causa causans*. The motorman's negligence was the proximate cause of the accident. The transport company did not come within the statute placing the onus upon it: 8 C.E.D. (Ont.), p. 147; *Dent v. Usher* (1930), 65 O.L.R. 117. If the onus was upon it, that onus had been discharged: *Field v. Sarnia Street Railway Co.* (1921), 50 O.L.R. 260.

J. R. Cartwright and *A. W. Greer*, for the plaintiffs, contended that the driver of the truck, as well as the motorman of the street-car, was guilty of negligence causing the accident; and, whatever view was taken, there was ample evidence of the motorman's negligence. Reference to *Willcox v. Niagara and St. Catharines Railway Co.* (1920), 19 O.W.N. 324; *Pleasant v. Hydro-Electric Power Commission of Ontario* (1925), 28 O.W.N. 91; 7 C.E.D. (Ont.), p. 624.

January 23, 1931. RIDDELL, J.A.:—This action arises out of an accident taking place on the 7th April, 1930, a few days after

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the coming into force of the revolutionary and eminently reasonable statute, the Negligence Act, 1930, which placed joint tortfeasors, in certain cases (at least), on the same footing as joint contractors, and removed one more anomaly of our law.

The facts are reasonably simple: the plaintiffs were passengers in a car of the Oshawa Street Railway, which was proceeding south; coming north was a somewhat cumbersome truck of the Smith Transport Company; when at some distance south of the street-car, but in plain sight of it, the driver of the truck, seeing an automobile parked at the east kerb, turned in to the west upon the street-car track; passing the parked automobile some 30 feet, he turned east to get off the car-track and avoid the on-coming car; by reason of the slippery condition of the place, his driving wheels slipped and his truck swung around, but did not leave a clear course for the street-car to pass. The motorman saw the truck, but seems to have appreciated the danger too late: he did not apply his brakes soon enough to prevent striking the stalled truck; an impact took place, and the plaintiffs were injured.

The case was tried before Mr. Justice Raney without a jury at Whitby; and that learned Judge, while he found that the driver of the truck was negligent, considered that the effective cause of the accident was the negligence of the motorman of the street-car; he accordingly directed judgment to be entered for the plaintiffs for \$1,200 and \$300 respectively against the railway company with costs, and dismissed the action against the Smith company without costs.

The railway company appeals, on the grounds: (1) that there was no negligence on its part; (2) that the negligence of the truck-driver was the only negligence, the effective cause, or, at least, one cause, of the accident; and claiming (1) a dismissal of the action against it, or, at least, (2) contribution under the new statute.

The statute in question reads:—

“3. In any action founded upon the fault or negligence of two or more persons the court shall determine the degree in which each of such persons is at fault or negligent, and where two or more persons are found liable they shall be jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each shall be liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

“4. In any action for damages which is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff which contributed to the damages, the

court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

"5. If it is not practicable to determine the respective degree of fault or negligence as between any parties to an action, such parties shall be deemed to be equally at fault or negligent."

The statement of claim charges the railway company with causing the accident by gross negligence (sec. 11), and also charges the Smith company with negligence; while, though, no doubt by inadvertence, it does not charge that the plaintiffs were injured by the latter negligence, it claims from both defendants the amount of damages asserted.

Plainly, the case comes under sec. 3 of the new Act; and the railway company is within its rights in claiming that, even if it should be held liable for the total damages to the plaintiffs, its co-defendant is liable to make contribution to an extent to be determined by their relative negligence, as it should be properly found.

All technicalities being waived, the case was fully argued by all parties; and it is now our duty to give the judgment which should have been given by the learned trial Judge.

Much of the argument proceeded on a wrong basis; it is clear that what has to be considered first is the right of the plaintiffs against each of the defendants.

In that view, after a careful consideration of the evidence, I am unable to find that the trial Judge was wrong in finding that the negligence of the motorman was an effective cause, a *causa causans*, of the casualty. The real point of difficulty is whether the negligence of the truck-driver does not give a cause of action to the plaintiffs. In this connection, it may be noted that the learned trial Judge finds explicitly: "I had no difficulty in finding at the trial that the driver of the truck was negligent. No reason was shewn for his being on the company's right of way, except for the purpose of passing the parked automobile, and if he was wholly off the right of way before reaching the parked automobile, he ought, in view of the imminence of the arrival of the street-car at that point, to have stopped behind the automobile and waited for the street-car to pass. If he was on the right of way all the while" (and this appears to be his story) "so much the worse." With this I agree. Logically, there being no such thing as negligence at large, and negligence necessarily implies breach of duty towards some one, this means that the truck-driver was guilty of breach of duty towards the plaintiffs; with the inference that this breach of duty was the—or a—cause of the accident.

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Whatever, however, may be the technical meaning of the finding, it is apparent that the trial Judge did not intend to find that the truck-driver was guilty of negligence, a cause of the accident. The judgment proceeds: "The situation, so far as the driver of the truck was concerned, had been made up. He had no business to be on the railway track, but he was doing all he could to get out of the way. Notwithstanding his negligence, the motorman could have avoided the collision. On the cases, I think the whole responsibility for the collision is on the railway company."

This finding is that the conduct of the truck-driver, call it negligence or what you will, had nothing to do with the accident. If this finding is to stand, the judgment is right.

While, since the "*Bernina*" case, *Mills v. Armstrong* (1888), 13 App. Cas. 1, it has never been doubted that the negligence of the driver of a vehicle in which the plaintiff was a passenger does not absolve the negligence of another which, joined with the driver's negligence, causes damage to the plaintiff; still, if what is considered negligence of the third party has nothing to do with causing the accident, but the negligence of the driver is the sole cause, the third party is not liable. In the case of *Nicholls v. Great Western Railway Co.* (1868), 27 U.C.R. 382. the plaintiff, a passenger in a cab, was injured at a railway crossing: the company had neglected to have a fence and gate at the crossing with a man to watch, as it was claimed that they were obliged to do; but the driver of the cab, while warned by the plaintiff of an approaching train, had, on the urging of another passenger, pushed on and had been caught by the train. The Court held (p. 395) that there was "nothing moving towards the unfortunate accident . . . except an utter disregard on behalf of the cab-driver of that common prudence and care which should govern every person about to cross a well-known railway crossing;" and agreed that the trial Judge had properly nonsuited the plaintiff. This case, be it remarked, is cited only as to the result which follows a finding that the negligence of the driver of the vehicle in which the plaintiff is being carried is the sole and only cause of the casualty; not for the decision that the negligence of the railway company was not a cause; that may be considered doubtful since the *Loach* case, [1916] 1 A.C. 719, the principle of which made its first appearance in our Courts in the judgment of Anglin, J. (now Chief Justice of Canada), in *Brenner v. Toronto Railway Co.* (1907), 13 O.L.R. 423, referred to by the Court on the argument. See *Matthews v. London Street Tramways Co.* (1888), 58 L.J.Q.B. 12, 5 Times L.R. 3; *Lynam v. Dublin United Tramways Co.*, [1919] 2 I.R. 445, 460 (C.A.)

The law in this regard has not been altered by the former Contributory Negligence Act, R.S.O. 1927, ch. 103, or by the Act of 1930, referred to above. Consequently, while the negligence of the driver cannot, in whole or in part, *quoad* the plaintiffs, reduce, or modify the liability of the third party for negligence on his part, still, if it is the only cause of the accident, the third party is relieved from any consequences that may be alleged to flow from his conduct.

The single question, then, is: "Was the negligence of the driver, the motorman, the sole cause of the accident, or did the conduct of the truck-driver contribute in any degree?"

It cannot be denied that the conduct of the truck-driver was in some sense a cause, inasmuch as if he had not been where he should not have been, the accident would not have happened; but that is not enough—his improper conduct must be held to have had some effect before he can be rendered liable; *causa causans*, not simply *causa sine quâ non*.

I am of the opinion that, unless we are to disregard the principle laid down by the Judicial Committee in *British Columbia Electric Railway Co. v. Loach*, [1916] 1 A.C. 719, we cannot say that the conduct of the truck-driver was not to some degree the cause of the accident; he took it upon himself to go where he should not have gone without being sure that he could get out of the way of the approaching street-car, he incapacitated himself from exercising such care as would have enabled him to avoid any negligence on the part of the motorman; and I think we must hold him responsible to the plaintiffs.

This is quite irrespective of the statutory onus cast upon him by the Act.

I find it to be "not practicable to determine the respective degree of fault or negligence as between the parties," and must follow the direction of the statute, sec. 5, and find each equally at fault.

I would allow the plaintiffs' appeal, direct judgment to be entered in accordance with the provisions of the statute, with costs as follows—the plaintiffs to have their costs of the action as against both parties, and their costs of appeal, half against each defendant; the Oshawa Street Railway Company to have half its costs of this appeal, against the Smith company, as it succeeded only in part, i.e. in its appeal, substantially against the Smith company; and there should be no costs of the proceedings in the Court below as between the defendants.

MASTEN, J.A.:—This was originally an appeal by the Oshawa

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Masten, J.A. In the course of the argument before the Court, the plaintiffs applied for an extension of time and to be allowed to appeal against the finding of the trial Judge whereby he dismissed the action against the Smith company. Leave was granted, and notice of motion served accordingly. Counsel for the Smith company not asking that the hearing of the case against it should stand over, the argument then proceeded on both appeals.

The facts giving rise to the action are clearly and accurately detailed in the judgment which has been prepared by my brother Riddell, and need not be re-stated.

On the original appeal, Mr. McCarthy argued with great force and ability that the driver of the street railway car not only kept a proper lookout, but that in slowing down as he did to 5 miles an hour so that he could have stopped his car in 10 or 12 feet, and otherwise in his conduct, as detailed in the evidence, he did everything that a reasonable man could have done to avert the accident. He also urged upon us that up to the very last moment the driver of the street-car was entitled to rely upon the expectation that the Smith truck would get off the rails in plenty of time. I think that up to the time when the street-car was some 30 feet away from the truck the view presented by Mr. McCarthy is sound; but at that moment I think that the driver of the street-car ought to have been aware that the truck-driver was in trouble and might be unable to succeed in his effort to get his trailer off the rails, and, as the street-car was then proceeding at no more than 5 miles per hour and could have stopped in 10 or 12 feet had the driver then reversed, I think that he failed at that moment to do what was reasonable under all the circumstances, having regard to the fact that he is supposed to be an expert and experienced driver. I would, therefore, on this ground dismiss the appeal of the Oshawa Street Railway Company from the judgment pronounced against it.

With respect to the appeal of the plaintiffs against the dismissal of their claim against the Smith Transport Company, I am of opinion that this appeal should be allowed. I think that in entering upon or proceeding upon the right of way of its co-defendant the Oshawa Street Railway Company, without the driver being satisfied that he could get off that right of way before the on-coming street-car reached him, he was guilty of negligence in that regard. I concur in what has fallen from my brother Riddell in the judgment written by him, and I also agree with him that it is not practicable to determine the respective degrees of fault

or negligence as between the Oshawa Street Railway Company and the Smith Transport Company. App. Div.
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I would allow the plaintiffs' appeal against the dismissal of their action against the Smith company and concur in the judgment as proposed by my brother Riddell.

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LATCHFORD, C.J., and FISHER, J.A., agreed with RIDDELL, J.A.

Order as stated by RIDDELL, J.A.

Masten, J.A.

APPENDIX I.

SUPREME COURT OF ONTARIO.

Rules Respecting The Conduct of Matrimonial Causes.

Revised and Passed by the Judges of the Supreme Court, on
Friday, November 21st, 1930.

1. "Matrimonial Cause" shall mean an action under the provisions of "The Divorce Act (Ontario) 1930."

2. Save as hereinafter provided a matrimonial cause shall be conducted in the manner prescribed by the Consolidated Rules.

3. No cause of action, save for alimony or the custody of children, shall be joined with a claim for the dissolution of marriage or for the annulment of marriage without the leave of a judge to be obtained *ex parte* before the issue of the writ.

4. The statement of claim shall be filed at the time the writ is issued and shall be served therewith, and the writ shall contain an appropriate provision directing a statement of defence to be filed within ten days after the entry of appearance. Any order under the preceding rule shall be served therewith.

5. The statement of claim shall show:

(a) The place and date of the marriage and the name of the wife before marriage, and the address and status of the parties at the date of marriage;

(b) The principal permanent addresses where the parties have co-habited within the jurisdiction;

(c) Whether there has been issue of the marriage and, if so, the names and dates of births and ages of such issue. If any of the said issue are dead at the time of the bringing of the action this shall be stated;

(d) The occupation of the husband and the place of his residence, his domicile at the time of the marriage and at the date of the institution of the action, and if the wife claims to be entitled to maintain an action under the Divorce Jurisdiction Act 1930 the facts upon which such claim of right is founded.

(e) Whether there have been, and if so what, previous proceedings with reference to the marriage by or on behalf of either the parties to the marriage and the result of such proceedings. (This includes alimony actions and applications to the Parliament of Canada).

(f) The matrimonial offences set out in separate paragraphs, giving the name and address of every person with whom adultery is charged, if this is possible, and shall conclude with a prayer setting forth the particular relief claimed.

6. Every person with whom adultery is alleged shall be made a party defendant in the action unless upon special application to a judge it is otherwise ordered. The application may be made *ex parte* before the issue of the writ and the order shall be served with the writ.

7. If the name of the person with whom adultery is alleged is unknown to the plaintiff at the time of the bringing of the action, the plaintiff may apply to a judge for an order allowing the action to be brought without adding him or her as a party defendant. Such leave may be given upon the terms that so soon as the name of the alleged adulterer is ascertained he or she shall be added as party defendant and all necessary amendments shall be made.

8. Every statement of claim shall be accompanied by an affidavit made by the plaintiff verifying the facts of which he or she has personal cognizance and deposing to belief in the truth of the other facts alleged in the statement of claim, and further stating that no collusion or connivance exists between the plaintiff and the defendants or any of them.

9. The writ and statement of claim shall be served by some person other than the plaintiff. No proceedings based upon default of appearance and defence shall be taken unless and until it is clearly shown that the person served was the defendant.

10. When the statement of defence is filed, if it is more than a denial of the facts stated in the statement of claim, it shall be accompanied by an affidavit of the defendant verifying the facts of which he or she has personal cognizance and deposing to belief in the truth of the other facts alleged in the statement of defence.

11. When a defendant seeks relief by reason of a countercharge he shall deliver a counterclaim.

12. In any matrimonial cause no judgment shall be entered upon consent of parties, admissions or in default of appearance or of pleading or otherwise than after a trial.

13. If either party serves a jury notice the action shall be heard at a sittings for the trial of actions with a jury and any question

of fact shall be determined by the jury upon a written question submitted to them by the judge. A general verdict shall not be taken. Notwithstanding this provision an action may in the discretion of the trial judge be tried without a jury when all parties consent.

14. Every judgment for a divorce shall in the first instance be a judgment nisi, not to be made absolute till after the expiration of six months from the pronouncing thereof, and during that period any person shall be at liberty to show cause why the said judgment should not be made absolute by reason of the same having been obtained by collusion or by reason of material facts not brought before the Court; and, on cause being so shown, the Court may make the judgment absolute, or reverse the judgment nisi, or may direct further inquiry, or make such other order as justice may require.

15. The Attorney-General at any stage of the action may intervene for the purpose of showing collusion or of bringing any evidence before the Court.

16. Where the Attorney-General or any other person desires to intervene he shall file and serve notice of his intention and shall thereafter be served with notice of all proceedings in the cause.

17. After the expiry of the period of six months mentioned in the judgment nisi the cause may be set down for hearing before a Judge in Court upon motion that the judgment may be made absolute. Upon this motion it shall be shown that a copy of the judgment nisi was served upon the Attorney-General within one month from its date and that no notice of intention to intervene has been given or that due notice has been given to the Attorney-General or any person who has given notice of intention to intervene.

18. If notice of application to make the judgment absolute is not served by the plaintiff within three months after the expiry of the said period of six months the defendant may move for the disposition of the cause and the judge may either make the judgment absolute or may dismiss the action for want of prosecution and vacate the judgment nisi or may make such other order as may be deemed just.

19. An order may be made by a Judge for payment of a wife's interim disbursements by her husband.

20. Rule 25(1) is amended by adding the following: "(m) In a matrimonial cause."

21. All actions pending at the date of these rules shall so far as practicable be governed thereby.

These rules shall come into force forthwith.

APPENDIX II.

Ontario cases decided on appeal to the Judicial Committee of the Privy Council and the Supreme Court of Canada and reported since the publication of vol. 65 of the Ontario Law Reports.

ATHONAS V. OTTAWA ELECTRIC RAILWAY CO. AND GLOVER, 38 O.W.N. 20, reversed by the Supreme Court of Canada: ATHONAS V. OTTAWA ELECTRIC RAILWAY CO., [1931] S.C.R. 139.

GREEN V. FRASER, 65 O.L.R. 90, affirmed by the Supreme Court of Canada: GREEN AND RIDDELL V. FRASER, [1931] S.C.R. 160.

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